A

TREATISE

ON

CONVEYANCING,

&c.

A

TREATISE

ON

CONVEYANCING,

&c.

BEING VOL. III.

CONTAINING

AN ESSAY

ON

THE QUANTITY AND QUALITY OF ESTATES,

WITH

MORE IMMEDIATE REFERENCE

TO

The Law of Merger.

BY RICHARD PRESTON,

Of the Inner Temple, Esq.

AUTHOR OF THE ELEMENTARY TREATISE ON THE QUANTITY OF ESTATES, &c. &c.

In primisque hominis est propria veri inquisitio atque investigatio.

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THIS VOLUME IS INSCRIBED

TO THE

RT. HON. SIR VICARY GIBBS,

THE

Chief Justice

OF

His Majesty's Court of Common Pleas, &c. &c.

AS

A TRIBUTE OF SINCERE RESPECT

FOR

THOSE TALENTS, AND THAT PROFOUND KNOWLEDGE

OF

THE LAW,

FOR WHICH

HE IS SO EMINENTLY DISTINGUISHED.

TO THE READER.

MORE than twenty years have elapsed since the essay now submitted to the public was announced by Mr. *Butler* in one of his valuable notes to the octavo edition of *Coke on Littleton*. At that time one half only of the volume had been written, and that half was in an imperfect state.

In the interval, every authority which has occurred has been enlisted into the service of this work. Though merger be the subject, yet in truth and in effect the volume contains a *Treatise on Estates*, and may be considered as an essential part of the undertaking, in which the author is engaged.

Though merger, in itself, is an abstruse subject, yet any one at the most early age of his studies, may safely take this volume into his hands, and peruse it as an elementary treatise; and as the means of adding to the stock of knowledge which he has to acquire in the progress of his studies. Without pursuing this mode of treating the subject, the learning of merger would not have been interesting, though highly useful. The

volume now contains at least three thousand propositions, on subjects of every day's occurrence; and there is scarcely a proposition throughout the work which will not be found useful even in the earlier part of the student's career.

Although some errors will no doubt be discovered in this work, yet in detailing the language of reports and of text writers an attempt has been made to caution the reader against those errors into which he might be led, by positions which are doubtful, or are supposed to be over-ruled, or not to be well founded.

This is a very important part of an elementary work; and one which cannot be too generally introduced, or carefully observed.

Should the reader derive as much benefit from the perusal, as the author has in the compilation, of this volume, the end which he proposed to himself will have been fully attained.

There are a few verbal and literal errors of the press, and some of the author, which the reader will easily correct; in particular he should insert *æquitas* for *æquitus*, and *valorem* for *valentiam*

7, Lincoln's Inn, New Square,
1st Sept. 1816.

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A

PRACTICAL TREATISE

ON

CONVEYANCING.

ON SURRENDERS,

INCLUDING

MERGER.

INTRODUCTION.

THE surrender of estates, and the form of the instrument of surrender, will be the subject of this volume.

As the merger of the estate to be surrendered, forms a circumstance in the definition of a surrender, the law of merger of estates is, of consequence, intimately connected with the law of surrender.

Besides, the law of merger is in itself a curious and interesting learning, scattered in the books, and not collected with scientific skill, or in a detailed manner in any work: also, as this subject will be found worthy of notice, in proportion as it

is thoroughly understood, the first and a large part of this volume will be devoted to a review of the learning applicable to merger. This will be done from the fullest conviction, that its importance, illustrated as it will be with observations leading to practical conclusions, will engage the attention, and invite the study of those for whose use this work is designed. No subject has engaged more of the author's attention for the last twenty-five years, or received a greater portion of his research.

To the conveyancer in particular this learning is of high importance. The security and sometimes the foundation of a title, depends on this learning; and now, since the practice of procuring an assignment of outstanding terms, to protect the inheritance, is so generally adopted, this learning frequently decided the inquiries necessary to be made for existing incumbrances. Sometimes also the advantage of priority, as between incumbrances, (a) will be lost for want of sufficient caution in the application of this head of the law. That titles are open to objections, or free from them, is a conclusion frequently to be drawn, on a review and consideration of this subject. Gentlemen engaged in the other departments of the profession,

(a) Hasket v. Strong, 2 Str. 689.

have some, though perhaps not equal occasion to be intimately acquainted with this learning. (*b*) That an action of ejectment, or of waste, may or may not be maintained; that an estate shall be considered as held in possession, or in reversion, or in remainder; (*c*) that a subsequent mortgagee for a valuable consideration, and without notice of a former mortgage, shall prevail over the prior mortgagee, by obtaining a conveyance of a legal estate, anterior in point of time, or the order of its limitation, to the estate vested in the first mortgagee; that judgment in a writ of dower, shall be with a *cesser* of execution, during a term or not; that there is or is not a complete right in a husband to curtesy, or in a wife to dower; that a writ of right may or may not be maintained; that a common recovery is good or bad; that the demandant's writ may be abated or not; that a joint-tenancy is or is not severed; that a contingent remainder is or is not destroyed, or does or does not admit of destruction; that preference shall be given to the heirs on the part of the father, or of the mother; that the heir of the purchasing ancestor, or the heir of the person last seized, shall suc-

(*b*) Co. Lit. 273. b. 338. b. Com. Dig. Surr. L. 2.

(*c*) Willoughby v. Willoughby, 1 Term Rep. 763. 1 Coll. Juridica, 337.

ceed to the estate; that the present owner deriving his title partly under an intail, and partly by descent of the expectant fee, shall hold the lands charged with the debts of his ancestor, or discharged from the same; that a tenancy by copy of court roll has ceased; that a conveyance is operative, are conclusions which must be drawn in a great variety of instances; and it will happen more frequently than is generally supposed, that these conclusions cannot be drawn without reference to the law on the merger of estates. That these and other considerations of the same nature arise out of this learning, will appear from a perusal of this essay. The necessity then of studying a head of law, involving so many important considerations, is too obvious to require a recommendation enforced in strong terms. Perhaps it may be advanced, that few subjects are more deserving of investigation; and it is well known, that few have received a smaller portion of attention. Numerous, and, in many instances, refined distinctions arise out of the law relevant to this subject. Several points connected with this learning, still remain open for litigation, consequently, they leave room for doubt, and therefore merit inquiry and examination. On this occasion, as in the attempts already made, the author will be content to propose the rules, to exhibit

the instances to which they apply, and state the circumstances under which distinctions arise, on the one hand admitting, and on the other hand excluding the application of the doctrine. This plan is sufficiently comprehensive for his purpose. It will enable him to advert to the cases, furnishing examples of the distinctions; to introduce the exceptions, and observe on the points still remaining unsettled. With candid and liberal men, the difficulty of the subject, to be explored, only by means of intricate and unbeaten paths, will be an excuse for the defects and errors they shall discover. From those most distinguished for their abilities and their knowledge, he knows, by experience, that most candor and liberality are to be expected. They of all others are best qualified to judge of the difficulty of writing a treatise on this subject.

CHAP. I.

On the Objects and Definition of Merger.

THE object of merger is to accelerate the possession, or at least the estate in which the merger takes place. This observation will disclose the reason of several of the determinations, particularly the doctrine of the merger of terms in each other.

A definition of merger (*a*) is not easily given, and it is less easy to present the reader with an accurate and summary view of the circumstances which furnish the conclusion that a merger has taken place. (*b*) Sometimes merger is described to be whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, whereby the less is immediately annihilated, or is said to be merged, that is, sunk or drowned in the

(*a*) Webb and Russel, 3 Term Rep. 402.
(*b*) Hillyard on Shep. Touch. 341.

greater. (c) Nothing is more clear, than that merger is an act of law; and it appears entitled to the denomination of the extinguishment by act of law of one estate in another by the union of these two estates. To consolidate two estates, and confound them into one estate, is its effect. The estate thus blended, will give the precise time of enjoyment, originally limited by the more remote of the two estates, and no more. This point should be kept steadily in view. It is always to be remembered that the estate in which the merger takes place is not enlarged by the accession of the preceding estate. After the merger, the only subsisting estate continues precisely of the same quantity and extent of ownership as it was before the accession of the estate which is merged. An analytical inquiry into the subject, will prove merger to be an act of law. It will also prove that as far as the person in whom the two estates unite is concerned, it extinguishes one estate, and attains this end by confounding the time of the prior particular estate, in the time of the next vested estate. These observations shew that the union of the two estates enters essentially into the definition of merger, and is necessary to the operation of this act of law. Extinguishment is a consequence of the application of the doc-

(c) 2 Bl. Com. 177.

trine. This is to be collected as a clear proposition, from the circumstance, that unless the two estates unite so as to become one, and as against the person on whose tenancy this act of law takes place, give one entire and undivided estate, and unless the former of these estates be extinguished, or at least suspended in the more remote estate, the prior estate is not affected by the doctrine of merger. For *extinguishment*, in other words *merger*, is the effect, while union is the cause. In Smith and Lord Camelford, (*d*) the late chancellor gave a very accurate description of the effect of merger, in observing that the estate for life was moulded into the estate-tail. In an ingenious argument on the case of Webb *v.* Russell, (*e*) Mr. Serjeant Shepherd stated the general rule of law to be, that "where a term and reversion "expectant on that term, unite in the same "person by a different creation, in the same "right, the term is merged in and extin-"guished by the reversion." In a subsequent part of this essay, it will be necessary to advert to two branches of this definition; first to shew that the different creation is not essential to merger, and secondly, that in some cases there may be a merger, though the several estates are not held in the same right.

(*d*) 2 Ves. Jun. 714.

(*e*) 3 Term Rep. 394. See also Brooke Exting. pl. 50. Co. Lit. 182. Saund. 387. Salk. 326.

CHAP. II.

On the Difference between Merger, Suspension, Extinguishment, Discontinuance, and Remitter.

To render the principal subject more intelligible, it will be convenient and useful to consider the difference which in point of law exists between the five acts of law denominated merger, suspension, extinguishment, discontinuance, and remitter.

Merger is the annihilation of one estate in another.

Suspension is a partial extinguishment, or extinguishment for a time.

Extinguishment is the annihilation of a collateral thing or subject, in the subject itself out of which it is derived. A rent (*a*), a common, or a seignory, may be extinguished. That the estate in the rent, common, or seignory, ceases, is the consequence of the extinguishment of the subject itself. When the subject ceases, the estate therein

(*a*) 2 Roll. Abr. Surr. C. Com. Dig. Surr. D.

must also cease. Under the doctrine of merger the subject may continue after the annihilation of one estate in another; for notwithstanding the annihilation of the estate, the subject continues, and the effect of the merger is only to involve the time of one estate in the time of another estate, or at the utmost, to accelerate the right of possession under the more remote estate. Thus suspension and extinguishment, correctly taken, are applicable rather to the things themselves, than to the estates or degrees of interest therein.

Discontinuance is the cesser of a seisin under one estate, and the acquisition of a seisin under a new, and necessarily a wrongful title.

It is the cesser of seisin under one estate, and the commencement of a seisin under a new title: thus, when tenant in tail discontinues the estate-tail, the title under the estate-tail is suspended, and there is a new estate under a new title, gained by wrong. The same effect is produced, though the remedy to redress the injury is different, when a tenant for life aliens tortiously, and by that means puts an end to the seisin under which he was tenant for life, and a new seisin depending on a new title is gained. (*a*)

(*a*) 1 Inst. 251. b. Chudleigh's Case. 1 Rep. 140. Goodright v. Forrester, 1 Taunt. 578.

Remitter is the act of law which puts an end to the seisin under the wrongful and new acquired title, and restores the rightful owner to the ancient seisin and better title.

Suspension is merely for a time, because the party whose interest is to be suspended, has a particular estate; or because he has a defeasible interest, so that the subject itself, or the estate therein may revive, when there shall be a separation of these interests, which, if they were absolutely united, would be extinguished.—Lord Coke(*b*) has accurately drawn the distinction, with the exception that he hath omitted the durability of title. According to his Lordship, "suspence in legal "understanding is taken when a seigniory, "rent, profit, apprendre, &c. by reason of "unity of possession, of the seigniory, rent, "&c. and of the land out of which they issue "are not *in esse* for a time, *et tunc dormiunt*, "but may be revived or awaked; and "they are said to be extinguished when "they are gone for ever, *et tunc moriuntur*, "and can never be revived; that is, when "one man hath as high and perdurable an "estate in the one as in the other."

Perhaps, the doctrine of *remitter* may appear to have some connection with the learning on merger. An attentive examination

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(*b*) 1 Inst. 313. a.

of the two subjects will prove that there is a wide difference in the mode in which merger and remitter severally operate; remitter is the same in effect, *as to rights* and *titles*, which merger is as to *estates*; and extinguishment is *of things*. The doctrine of remitter proceeds on the ground that the possession is cast on an *innocent* person, who has an existing title to the possession, or in the pithy language of the law, an entry *congeable*, (*c*) or that the freehold is cast on a person who has a right which is remediable, and who has done no act by which he has estopped himself to insist on his ancient title; and then, as often as the possession where the entry is lawful, or the immediate freehold, when the right is remediable, devolves to that person by act of law, or is vested in him by the act of the parties, without his concurrence or voluntary consent, or at a time when that person (as in the case of an infant, feme covert, &c.) is under an incapacity of giving assent to any act which would be prejudicial, the law does of itself, restore the party to that estate to which he had a subsisting right of possession, at the time when he entered, or a subsisting right of action at the time when the freehold devolved to him. By these means the law denies that the estate under which the party

(*c*) Gilb. Ten. 120. or 130.

in one case entered into possession, or in the other case became seised of the freehold has any continuance. So that remitter, when it operates, universally supplies the place of an entry, when an entry is lawful; and of an action, when an action might be maintained; and it redresses the injury done to the person, in whom the right resides; by putting him into possession, or obtaining for him seisin of the freehold under his rightful title, in the same manner, and to the same extent, as he could restore himself to his estate by means of an entry, or an action. This restitution of right by mere operation of law, is given in lieu of an entry, when an entry is lawful and might be made; and of an action when an action might be maintained; and it supplies the place, and has all the effects of such entry, or according to the circumstances, of such action. It is given upon the principles of justice; on the ground that the right of entry being in the person in actual possession, or the right of action being in the person who has seisin of the freehold, there is no one, in one case, upon whom he can enter, or in the other case, against whom he can bring an action; therefore the law places the party precisely in that situation to which his entry or action, grounded on his former title, would have restored him; and to the intent, that if any person will con-

trovert the title in an action, the *mere right*, as it subsists between these parties, may be discussed and decided.

From the writings of *Littleton* and of Lord *Coke*, his learned commentator, it will appear that the object of the law of remitter is to restore the party to his ancient title. Thus remitter puts an end to a defeasible estate. It seats the person in whom the right resides, in his former ownership, giving him the tenancy on the footing of that ownership. It revives the seisin under the ancient title, in favour of the person in whom the possession or the freehold becomes vested, under a defeasible estate.—Merger, on the contrary, puts an end to a subsisting estate, though held by a good title, and it accelerates the right of possession under a more remote estate, residing in the same person.

CHAP. III.

On the Origin of Merger, and the Principles to which this Learning is to be ascribed.

An endeavour to refer the learning of merger to any precise principle of policy, or of reason, and to support it with certain and exclusive pretensions, on that ground, appears to be a vain attempt The subject does not admit of any historical deduction. No conclusive reason can be assigned for some of the distinctions advanced on this subject, and to be collected from books of authority. In all probability, this learning results from the rule *nemo potest esse dominus et tenens;* or from the inconsistency in allowing a person to have two distinct estates in point of fact, while one of these estates does, at least in legal intendment, include the time of both these estates. Whether one or the other is the governing reason is equally uncertain. Each reason is open to some objections arising from the application of the doctrine to par-

ticular cases; and still no reason of more cogent argument can be advanced.

The learned *Gilbert*, in his Treatise on Tenures, has a passage, which if it may be understood to refer to the learning of merger, accounts for that learning on a ground which has very little correspondence with the second of these reasons. It has more connection with the reason drawn from the feudal law, against the existence of tenancy and seignory of the same land, in the same person. His reasoning is therefore referrable to the first reason, or ground. He accounts for this conclusion of law on the presumption of a disclaimer of the tenancy, and renunciation of the feud. After observing that if tenant for life makes a feoffment, or levies a fine, it is palpably contrary to his oath of fidelity to the reversioner, and therefore is a plain renunciation of the feud; he adds, so in the case of the remainder, the estate for life is drowned, therefore the estate for life is renounced, and the remainder commences. There is at least a large portion of plausibility in the reasoning thus advanced. However, this account of the reason of merger is not altogether satisfactory. The principle, considered as proceeding from the intention of the parties, or as depending on a breach of the feudal contract by the tenant for life, is not by any means free from objection.

Allowing the conclusion of law to proceed from intention, and to be founded on that basis, then the act of taking the remainder, must be as decisive in reference to the estate of the tenant for life, when he *takes a less* estate, as when he takes a larger one. Resting it upon default, then, when he becomes the owner of the fee, there is no one to claim any benefit from the renunciation of the feudal contract; and by taking a grant of a lesser estate in remainder, the estate of freehold will not merge, although the acceptance of *a present lease for years* will be a virtual *surrender of a lease for life.* (*a*)

Possibly *Gilbert* treats of the renunciation of the feudal contract, as a disclaimer of the former tenancy, and as proof of an implied intention to become the owner of the seignory, or to establish a more immediate connection between himself and his lord, and his anxiety, will, and determination to be the tenant of an estate held under different conditions. Even these reasons do not place the doctrine on a ground which in its application to all cases is tenable.

Sometimes, it has been said, that the reason of merger and extinguishment, is the *admission of the lessor's power to make a*

(*a*) Com. Dig. Sur.

new lease. This reason has been repeatedly denied; and it has been insisted that merger is effected merely on the ground of the accession of the immediate reversion to the particular estate. Clearly and indisputably, the accession of one estate to another, or more accurately speaking, the circumstance that two estates immediately expectant on each other, meet, or are united in the same person, is the cause of merger. Still, however, the reason for which merger is the conclusion of law, on this accession of estate, is not rendered more obvious by this deduction, or by this admission.

The cases to be cited in the progress of this essay, will also prove that the reason of merger has sometimes been referred *to the change of remedy*.

Among the more probable grounds on which the doctrine of merger is applied to estates, the leading, though certainly not the only circumstance, is that the time of one estate also comprises the time of the other estate; and that it would be absurd for the law to admit that the same person had two distinct estates, when the time of one of these estates was, in construction of law, equal to and involved in the time of the other of these estates.

It was to this ground that the doctrine of merger was referred in *Bracebridge's*

case(*b*). The line of reasoning adopted in that case, was that a term is a time finite; and the finite of necessity ought to be merged, and confounded, in the infinite.

Though it is obvious this was the origin of the law on merger, yet it will also be discovered, that in practice, the doctrine is carried far beyond its principle. When there was an estate for life, and the fee also came into the tenancy of the same person, it was highly reasonable for all the purposes of tenure, actions, &c. that the law should treat that person as seised of the fee. But when it was determined that one estate for life, should be absorbed in another estate for life, the law concluded that to be certain which is only possible. It assumed it to be clear that the estate in reversion or remainder would continue longer than the estate in possession. And when the law carried the rule to the extent, by which it operates in some particular cases, to the exclusion, and in destruction, of contingent interests, it did a palpable and manifest injury to the intention of the parties, without, apparently, at least, advancing any scheme of policy, or answering any end of justice.

And it may be offered, as a conjecture, carrying with it some semblance of proba-

(*b*) Plow. Com. Rud. of Law and Eq. 191. Dav. 4. 6.

bility, that merger was originally introduced into our system of tenures for the purpose of deciding on the right between the *heirs* and *executors* of a deceased tenant, who was the owner of several estates, one for years, the other in fee. Under these circumstances, a preference would, beyond all doubt, be given to the heirs. That they should be preferred, was a necessary consequence of the dependant state of the termor on the freeholder. (*c*)

On a question of title between mere freeholders, and the owners of the inheritance, the system of tenures, adopted in this country, afforded no ground for dispute. The estate for the life of the tenant, although he was also the owner of the inheritance, must, as far as related to the estate for life, unless he was tenant for the life of another person, have determined with his death. Supposing him to have been tenant for the life of another person, then the practice of naming the *heirs* to be special occupants (*d*), was universal; or at least so general, that the instances to the contrary, are extremely rare and merely exceptions. Indeed, it has been contended that executors were incapable of a freehold interest by the common law, and therefore

(*c*) See Essay on the Quantity of Estates, Ch. Freehold.

(*d*) Campbell *v.* Sandys, Scholes and Lefroy, 289.

could not take as special occupants, even though the limitation were to the tenant and his executors. (*d*) This doctrine, however, has been advanced by Lord *Redesdale*, (*e*) while Lord *Eldon* (*f*) seems to have adopted the contrary doctrine.[3]

It is admitted there cannot be any general occupancy of copyholds,(*g*) or of rents;(*h*) but the lord, in the one case, and the tenant, in the other case, shall hold discharged from the estate for life: although the estate for life has continuance in right, so as to support a contingent remainder :(*i*) and it is said the statute for continuing the estate to the executors, where there is no special occupant, does not extend to rents or to copyholds, &c. In all other cases, except as to rents and copyholds, it is now a point of speculation, whether executors can be special occupants or not, since in all cases in which the heirs are not named as special occupants, (*k*) the executors will take as occupants under the statute law.

In Roll's (*l*) Abridgment, there is a case

(*d*) Scholes and Lefroy, 289.

(*e*) Withers v. Withers, Ambl. 151. Smartler v. Penhallow, 2 Lord Raym. 994.

(*f*) Ripley v. Waterworth, 7 Ves. Jun. 440.

(*g*) Zouch v. Forse, 7 East, 186. 2 Bl. Com. 260. Right v. Bawden, 3 East, 276.

(*h*) Salter v.———, Yelv. 9.

(*i*) Yelv. 9.

(*k*) 29 Car. 2. c. 3. s. 12.

(*l*) Roll. Abr. 497. l. 35. 18 Edw. 3. 45.

of a lessee for life leasing to the lessor having the reversion, and to the *heirs* of his body, for the life of the lessee; and it is stated, and very correctly, that this is not a surrender, for perhaps there may be an heir of the body who will not be the heir general, so that the estates are divided. It is to be observed, that though the heirs of the body are named as special occupants, no intail but only a *quasi intail* is created, and the reversioner is the owner in his own right, of both estates, namely, the original reversion, and the estate granted by the underlease, and has a general power of alienation.

The reason to be assigned for this case is, that the reversioner is merely a lessee, and not an assignee; since from the particular manner in which the lease is penned, the original lessee thus making the lease, has a reversion or *mesne* estate, to take effect on a failure of heirs of the body of the original lessor; for as the limitation is to the heirs of the body, the grant may determine by a failure of these heirs, in the life-time of the original lessee.

Perhaps the rule that *nemo potest esse dominus et tenens*, does not clearly and beyond all controversy, furnish a principle to which the learning can be exclusively referred; yet of all other rules none affords principles to which the cases on merger bear a nearer affinity. This will be obvious when

it is considered that the learning on surrenders flows immediately from, and is a necessary consequence of the rule that *nemo potest esse dominus et tenens*, and that there is not any thing to which merger bears a nearer resemblance, either in circumstances or in effect, than a surrender. It is probable then that the conclusion of law, drawn upon the united tenancy of the two estates, is formed on the ground, that by this union, there is a surrender in law producing the same effect, as a surrender in fact would have done.

In *Sheppard's Touchstone* (m), merger is treated as a *surrender* in law. So it is in Chief Baron *Comyn's Digest*; and when the immediate effect of a conveyance corresponds to a *surrender*, the instrument must be pleaded as a surrender, and not in the words in which the intention is expressed. In short, there is *not any case in which merger will take place, unless the right of making and accepting a surrender*, resides in the several persons, between whom the transaction which causes the determination of one of these estates takes place. This consideration furnishes strong and tenable grounds for an opinion, that the doctrine of merger is founded on the idea of a surrender in law, corresponding in all material circumstances with a surrender in

(m) See Ch. on Surr. 299. Com. Dig. Surr. N.

fact: and hence the observation that the grant enureth by way of surrender (*n*). Merger differs, however, in some particulars from surrender; at least the analogy does not hold completely in all cases (*o*). A grant has not always the effect of a surrender, even when the grantee is capable of receiving a surrender from the grantor. Thus, when a man makes a lease for life, and grants the reversion to two in fee, and the lessee grants his estate to one of them, they are no longer joint-tenants of the reversion (*p*), for there is an execution of the estate, in other words, a merger for one moiety, and in the other moiety an estate for life, with reversion to the other of the joint-tenants; consequently the grant does not operate as a surrender as to either moiety. It operates by transferring the estate for life: and the merger of the estate for life, as to one moiety of the land, is a consequence of the union of the freehold and inheritance as to that moiety in the same person. In the other moiety of the land the estate for life has continuance. But by a surrender to one of two joint-tenants, the estate for life (*q*)

(*n*) Shep. Touch. Surr.
(*o*) Perk. 616. s. 623.
(*p*) 1 Inst. 183. a. Wiscot's Case, 2 Rep. 60.
(*q*) Perk. s. 615. 1 Inst. 192. a. Perk. s. 80.

in both moieties would have been completely extinguished, and both joint-tenants might have taken advantage of the extinguishment: therefore, though the operation of merger is, in its effect, as a surrender, yet in the *mode* of its operation, merger may be distinguished from a surrender. The object and effect of a surrender are to extinguish the estate, and the surrender is the identical and immediate cause of the extinguishment; while merger is merely the consequence of a rule of law; and the estate must be transferred, and therefore have some continuance in the grantee, for an instant at least, before the union will be complete, and the rule of law be applicable.

From these cases, the reader will collect the different operations of a grant and surrender, and the different uses to which they are to be applied.

To the operation of a surrender, in fact, it is also requisite that the tenant of the particular estate should relinquish that estate, in favor of the tenant of the next vested estate in remainder or reversion. On the other hand, the doctrine of merger is confined to the cases (*r*) in which the tenant of the estate in reversion or remainder, grants that estate to the tenant of the par-

(*r*) Perk. A. 616.

ticular estate, and to those instances in which the particular tenant grants his estate, to the tenant in reversion or remainder, before he is capable of a surrender, as in the instance of an interposed estate.

The rule *nemo potest esse dominus et tenens*, admits of similar distinctions, as between the tenant and the lord of the seignory.

Therefore, if the tenant purchase the seignory, instead of giving up the tenancy to the lord, there will be an extinguishment, with this difference, if he purchase the seignory as part of an *entire thing* which has continuance; for example, a manor or lordship, the tenancy will be extinguished; (*s*) while on a purchase of the seignory of the particular lands, the seignory, and not the tenancy, will be extinguished. This is material for the purpose of ascertaining the ancestor, or stock from whom the right of succession, in a course of descent, is to be derived. For if a man seized *ex parte materna* purchase the seignory of particular lands belonging to him, the seignory will be extinguished in favor of the heirs to the estate in the *land*. The effect of the purchase is to discharge the tenant from the services arising from the seignory, and the services will be ex-

(*s*) See Sav. 21.

tinguished in the land which is the principal, while the services are accessary: and no alteration will be made in the course of descent of the estate of the land. But under a purchase of the manor or lordship, from which the seignory arises, the land will become part of the *demesne* of the manor or lordship. The tenancy, and not the seignory or lordship, will be extinguished; and in this case the seignory or lordship is the principal, and the tenancy the accessary. The descent must therefore be deduced from the purchaser of the seignory, and not from the purchaser of the tenancy. (*t*)

On principles very similar to those under discussion, it is settled, (*u*) that when the same person has the *legal estate* in fee, and is also intitled to the *trust* or beneficial ownership of that estate, the trust will be extinct in the legal ownership. (*v*) By this operation the person who is heir to the legal estate, will be intitled to the beneficial ownership, in exclusion of the heir on whom the equitable estate, if it had continued distinct, would have descended. This doctrine proceeds on the ground, partly that a

(*t*) Roe v. Wegg, 6 T. Rep. 710.

(*u*) Watk. on Des.

(*v*) Goodright v. Wells, Dougl. 772. Selby v. Alston, 3 Ves. Jun. 339.

man cannot be a trustee for himself, and partly that as between heirs, claiming under a descent from the same ancestor, there is not any equity; and that the legal and equitable rights have been blended in the same ancestor. The heir inheritable to the trust, under the course in which the same would have devolved, has no equity available against the heir of the legal estate.

In no instance, however, can the legal estate *merge in the equitable ownership*; but under the doctrine of *attendant terms*, the ownership of the equitable interest, will give a claim to the protection, (*a*) and consequently to the benefit of the legal estate. The learning of merger had some influence in the establishment of the rule. For a term will not become attendant by construction of law, (*b*) unless the term, if of the legal estate, would have merged in the inheritance. But it may become attendant by express declaration (*c*); and after a term is once attendant then every person who has any interest, however minute, in the equitable ownership, is intitled to a commensurate interest in the legal estate; and the legal and equitable titles are united, although

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(*a*) Whitchurch v. Whitchurch, 2 P. Will. 236.
(*b*) Scott v. Fenhoulet, 1 Bro. Ch. Cas. 69.
(*c*) Ib.

the term and the inheritance remain distinct.

To the same principles as those respecting seignory and tenancy (*d*) may be referred the merger of estates in fee, of the copyhold tenure, in a particular estate of the freehold tenure. It is the *tenancy* rather than the estate, which is extinguished. Therefore, cases applicable to copyholds do not fall strictly under the doctrine of the law on merger; and yet, a treatise on merger, passing over this subject in silence, would as to copyhold lands be imperfect. It has even been determined,(*e*) that by the accession of the legal estate in fee, to a tenancy in tail of the trust, the equitable intail will be merged in the legal estate; and the remainders expectant on the estate-tail be defeated. And it has frequently been decided, that by the accession of the freehold tenure, to the tenure by copy of court roll, the tenancy by copy will be extinct when the degree of ownership in the different tenures, is commensurate; and be suspended, when there is not the same degree of ownership under each tenure; and an estate-tail in the copyhold will be effectually barred by

(*d*) Chaloner v. Murhall, 2 Ves. Jun. 524. Philips v. Brydges, 3 Ves. jun. 128. Dunn v. Green, 3 P. W. 9.

(*e*) Dunn v. Green, 3 P. W. 9. Philips v. Brydges, 3 Ves. jun. 128. Chaloner v. Murhall, 2 Ves. jun. 524. Grayme v. Grayme, 1 Watk. Copyhold, 79.

the union of the tenancies. So if the lord of the seignory purchase a tenancy, the tenancy will be extinct, and go inclusively with the manor. (*f*) The consequence is, that the purchased lands will pass by the will of the owner, as part of the manor, though the will by which the manor is devised, is made before the purchase. The same point applies to the purchase of a tenancy; also to the devise of a manor, and the subsequent escheat of a tenancy in the manor (*g*). For though it be a rule that lands purchased after the publication of a will, will not pass by that will, without a republication, yet lands which become part of the manor by an escheat, or by purchase after the publication of a will, will pass as part of the manor. In fact, the manor comprises the tenancy; the possession comes in the place of the seignory, and the land becomes parcel of the manor. The seignory, when purchased by the tenant is extinguished, and has no distinct existence, and being once extinguished, there is an end to all further deduction of title to the same, as a distinct inheritance, although the conveyancer must investigate the title up to the *point of* union. Following the same analogy, there

(*f*) Bunker v. Cooke, 11 Mod. 129. 6 T. Rep. 708. Roe v. Wegg, and others, 6 Rep. 708.

(*g*) Doe v. Pott, Dougl. 709. St. Paul v. Viscount Dudley and Ward, 15 Ves. 167.

will on the purchase (*h*) by a lord of a manor of a copyhold tenement, be an extinguishment of the copyhold tenure, although the demisable quality may remain.

There are other instances of surrenders in law which have no connection with the learning on merger. They depend on their particular circumstances, affording the conclusion that the particular estate is determined, because the conveyance cannot operate with full effect under any other arrangement. Thus in Lancastel *v.* Aller,(*i*) a father enfeoffed his son to the use of the father for life, remainder to the son in fee, and afterwards the father and son, on a communication that the father should have back the land in fee, came together to the land, and while upon the land, the son, by parol, *without any deed*, delivered seisin of the land to the father, *habendum* to him and his heirs, &c. and the question on this feoffment was, whether it was a good feoffment, or not. And by the opinion of the court it was a good feoffment; for in law, this *acceptance* of livery implied two effects, 1st, a surrender, and afterwards a feoffment; as the surrender to the grantee of a reversion amounts to an attornment and surrender. Without this construction

(*h*) Doe v. Pott, Dougl. 709. Roe v. Wegg, 6 T. Rep. 708. St. Paul v. Lord Dudley and Ward, 15 Ves. jun. 167.

(*i*) Dyer, 358. a. 2 R. Ab. 495. Perk. 205. Also Treport's Case, 6 Rep. 14.

the feoffment would have been inoperative, it would have had no effect whatever. The feoffor had a remainder in fee, expectant on an estate of freehold, and this estate would not enable him to convey merely by livery *without deed*, while the estate of freehold continued. To give effect to the transaction between the parties, the law drew the conclusion, that the tenant for life did, by accepting the feoffment of a remainder man, renounce his estate, and that this renunciation was a surrender in law, enabling the remainder man, by the supposed priority of consent to the feoffment, before it was complete, to make an effectual conveyance in that particular mode. A conveyance or grant *by the son* to the father, of the land, for the estate which the son held in remainder, would have given occasion for the operation of the doctrine of merger. But the construction received by these particular cases is made only from necessity, that the transaction may have effect in one mode, since it cannot have effect in any *other* mode: and therefore, in *Treport's* case(*l*) it was held that if lessee for life and the owner of the remainder or reversion in fee, make a feoffment by *deed*, each giveth his estate; namely, lessee for life his estate by

(*l*) Treport's Case, 6 Rep. 14. Bredon's Case, 1 Rep. 76. Stephens v. Bretridge, 1 Lev. 36. Raym. 36.

livery, and the fee-simple doth move or pass from him in remainder or reversion; but the court admitted that if it were by *word*, then it should be the feoffment of him in remainder or reversion, and the surrender of lessee for life: *for otherwise nothing should pass by word.* In modern times it will be necessary to advert to the statute of frauds and perjuries, (*l*) as denying effect to some surrenders at least unless they be by writing.

But as that statute does not, in construction, extend to surrenders by operation of law, the statute seems to leave the common law on this point, in full operation; (*m*) but the point is not free from doubt.

In *Treport's* case it was also said, by *Popham*, Chief Justice, that if a tenant for life and he in reversion make a gift in tail rendering rent, the *lessee shall have* the rent during his life; for the making of a greater estate, is not any forfeiture, because he joineth with him in reversion. And that if tenant for life and he in reversion had made a feoffment by deed at the common law, *the feoffee should hold of the* lessee during life. Bredon's case proves this proposition; for in Bredon's case (*n*) it was agreed that if a tenant for life and the person

(*l*) 29 Car. 2. c. 3.

(*m*) Magennis v. Maccullough, Gilb. Eq. Rep. 236.

(*n*) 1 Rep. 76. 2 Saund. 386. Com. Dig. Estates, P. 15. 1 Lev. 36.

who has the first remainder in tail, make a feoffment *by deed*, this is no discontinuance, or devesting of a more remote remainder; for each giveth that which he may lawfully give; and although he in the first remainder die without issue, the feoffee *shall enjoy the land during the life of the tenant for life.*

In *Bredon's* case, tenant for life of land, the remainder in tail with remainder over in tail joined with the first remainder-man in levying a fine, *sur conuzance de droit come ceo*, &c. to another in fee; rendering a rent-charge of forty pounds to the tenant for life. and the first tenant in tail died without issue in the life-time of the tenant for life. The second tenant in tail entered as for a forfeiture. The tenant for life distrained for the rent-charge, and the principal point agreed on and determined, by all the judges of the Common Pleas, was, that the fine levied by tenant for life, and by him in the first remainder was no discontinuance; but that each of them gave only that which he might lawfully give, viz. the tenant for life gave his estate, and he in remainder a fee-simple determinable; and judgment was given in favor of the tenant for life, who had a return of the cattle distrained, after they had been replevied, on the ground that there was not any forfeiture, and that the rent, and of consequence the title or seisin, under the tenancy for life, continued after

the death of the tenant in tail without issue.

From these cases, conclusions proving the continuance of the estate for life as not merged in the remainder, will be drawn in a more full and detailed manner in a subsequent part of this treatise. These cases will be cited, to shew that there are instances, in which there will be no merger, notwithstanding there is an union of two estates in the tenancy of the same person, under the circumstances, that several owners join in conveying their estates by one entire limitation.

In this place, it will be sufficient to observe, that according to the opinions expressed in *Treport's* case, and the resolution in *Bredon's* case, the estate for life is annihilated only for the purpose of giving complete effect to the intention of the parties; and that it continues, in point of tenure, as well as of title, as often as the continuance of that estate is compatible with the form and efficacy of the assurance, to pass the remainder or reversion as a remainder or reversion; while a *surrender* would extinguish the estate or seisin for all the purposes of future enjoyment.

By the rules of law, a remainder or reversion cannot pass without deed; consequently when a feoffment is made without an accompanying deed, a remainder or rever-

sion cannot pass as a remainder or reversion; and provided the estate for life be treated as a continuing estate, the remainder or reversion cannot pass by the livery, because the livery is necessarily the act of the person in possession. It will follow, that when tenant for life, and tenant of a remainder or reversion join in a feoffment without deed, the estate of the person in remainder or reversion will not be transferred, unless it can by some construction, be held to pass from that person by the livery. But when the feoffment is accompanied by a *deed*, purporting to be a grant from the tenant for life, and from the person in remainder or reversion, then livery is requisite, only for the purpose of passing the freehold, being the estate of the tenant for life, and the remainder or reversion will be effectually conveyed by the *deed*. No reason exists, under these circumstances, for any aid from rules of construction. The conveyance may operate in the *mode and form of the* instrument, and consistently with the intention of the parties, and therefore the estate for life, and the estate in remainder or reversion, will pass from the respective owners of these estates.

But when the feoffment is without *deed*, then the only mode by which effect can be given to the intention of passing the estate in remainder or reversion, is, by implying

a surrender from the tenant for life to the tenant in remainder or reversion, and by that means placing the tenant in remainder or reversion in the situation, and conferring on him the power, of making a feoffment; and, under these circumstances, the livery operates in the nature of an estoppel.

Another difficulty attending the consideration of the learning on merger, is, that the learning is, as already hinted, involved in great intricacy and confusion. Some of the cases are at variance; and in several instances they are totally irreconcileable. In other instances the opinion of the court is stated in very indefinite terms; so as to leave the point of the determination in great uncertainty; and a large portion of the learning rests merely on opinions, without any determinations.

In addition to these difficulties, the most extensive abridgments and best written treatises afford, in a collected state, a small portion only of information on the subject: and that information is rather jejune and unsatisfactory, than of any real assistance; and with the exception of the head in *Viner's* Abridgment, the cases or points relevant to merger, are to be found only in parts of different books.

To some of these remarks, the labors of Chief Baron *Gilbert*, under the title *Leases*

in *Bacon's* Abridgment, and of Mr. *Fearne*, in his Essay on Contingent Remainders, are exceptions. The distinctions they have taken, as far as they relate to the points, to which the distinctions are applied, fully solve the difficulties arising out of the determinations on which they have commented.

CHAP. IV.

A general Outline of the Operation of Merger.

MERGER is sometimes absolute, sometimes conditional. Generally speaking it is absolute. In some cases, however, it is only conditional. As against one person the estate may be merged, while as against another person, it may have continuance in point of title. This happens as often as some third person has a continuing interest under the lesser estate; but it should seem that when one particular estate, as an estate for years, merges in another particular estate, as in an estate for life, or in an estate tail, then in the first instance, the persons in remainder or reversion, and in the second instance the issue in tail, and those in remainder or reversion, cannot avoid the merger; for though the merger may be prejudicial to them, by extinguishing a right or remedy for a rent, &c. reserved on the estate which is

merged, yet unless there be *fraud*, the merger will remain in force. The ownership, though temporary and limited, qualifies and intitles the particular tenant to make, and the other to receive, such surrender: at least such is the understanding in practice. And that opinion naturally flows from our code of tenures; and it is part of the same system that a tenant for life may as the tenant in a writ of right lose the fee-simple to the demandant.

The general operation of merger is to involve and confound one estate in the time of the estate next in order of time, and which in its extent, is *as large as* the estate to be merged.

A larger estate is, of course, comprehended under these terms. Sometimes the doctrine proceeds further, and, disregarding a *contingent* interest, interposed between two estates, it forms an union of these two estates, in exclusion, and in absolute destruction of the contingent interest. In some instances, the union is positive and absolute, and the estates become inseparable.

In other instances it is conditional only;(*a*) and the two estates may become distinct and vested in different persons. Also as against the person in whom the

(*a*) Perk. s. 624.

several estates unite, the merger may be absolute, and his several interests resolved into one entire estate, with *one time of continuance*, and that time will be the particular period of the remainder or reversion in which the prior estate is extinguished; while as to strangers, as persons having liens (*b*), titles, &c. leases by way of *interesse termini* of the estate which is merged, may, in point of right, have continuance to support their claims and interests.

Again, there are instances, in which two estates may meet in the same person, and yet *remain distinct;* as when they are taken in distinct rights; one in right of the party, the other in right of a wife, or of a testator, (*c*) &c. This happens as often as one of these estates is an accession to the other by the *act of law*.

There are other instances, as already noticed, in which the two estates may meet in the same person, even in the same right, and yet form one time of continuance, equal, in extent of limitation, to the several interests or degrees of ownership, comprised in the times of the different estates; as when two persons who

(*b*) Com. Dig. Surr.

(*c*) Com. Dig. Surr. Co. Litt. 338. Platt and Sleep, Cro. Jac. Plowd. 418.

are owners of estates, which, if in the tenancy of one person, under distinct grants, would merge, convey these estates to a person or to several persons by the *same deed,* and in the same instant of time, and by the same united limitation (*d*).

The doctrine, apposite to these several subjects, will be considered more at large, and the niceties and distinctions in which the learning is involved, will be elucidated in different divisions or chapters, appropriated to this purpose.

(*d*) Stephens v. Bretridge, 1 Lev. 36. Bredon's Case, 1 Rep. 76. Treport's Case, 6 Rep. 14.

CHAP. V.

Inquiry whether Merger depends on the Intention.

It has been contended that there is not any rule or case in which there shall be a merger, where the estates may stand, and that taking it so, is only to preserve the intention of the parties. (*a*)

Consistently with this argument, there could not be any merger in opposition to the intention; on the contrary, the object which the parties had in their view, must uniformly influence, and govern the decision of the courts: and as often as no clear and distinct evidence of the intention is discoverable, the two estates must, to call the learning of merger into action, be so incompatible, that the continuance of one estate could not be admitted, consistently with the intention of the parties, in taking the other estate.

(*a*) Stevens v. Bretridge, Sir T. Raym. 36. 1 Lev. 36.

This argument is probably well founded, if we might resort to the principles on which the doctrine of merger originally prevailed. It would be difficult to maintain the doctrine at this day. The argument, even at the period when advanced, was not warranted by the cases previously decided; and from which the law was at that time to be collected. It had been determined that when a lease for years and a remainder for life were limited to the same person by the same deed (*f*), the estate for years should merge in the estate for life. Now this conclusion is in direct opposition to the clear and express intention; for unless the parties meant that the limitation for years, and the limitation for life should give distinct and subsisting interests, and that the estate for years should continue notwithstanding the determination of the estate for life, to what purpose did they introduce the limitation for years into the instrument? An intention to give an estate for life, and no longer, would have been completely answered at that time, as it would at this day, by a grant for that period. The limitation for years clearly and distinctly proves an ulterior intention. This mode of limitation was unquestionably framed,

(*f*) 1 Inst. 54. b. Uthen v. Godfrey and others, in note to Dyer, 309. b. Clarke v. Sir John Sydenham, Yelv. 85.

to give to the party not only an estate for life but for the years; thus providing against his death within the period of the years. It amounted to a stipulation that there should be a subsisting interest for the residue of the time of those years, notwithstanding the death of the life within the period of the years; and its object was to secure to the lessee an interest, positively and with certainty, for the life, and also for the years, if they should not expire during the period of the life. The limitations are good in point of law. The *mode* of limitation, however, was informal; and judging from the determination on that case, was improper.

That the intention does not decide the application of the law of merger, and that the rule of law takes place in some instances, at least, without regard to the intention, is abundantly proved by the determination applicable to the circumstances which have been stated.

The same proposition receives additional weight from the determination on the case of a lease for the term (*c*) of another's life, without impeachment of waste, with remainder to the same person for his own life. Under these circumstances, there is a merger of one of *two, estates*, created by

(*c*) Lewis Bowles's Case, 11 Rep. 83. 6. 1 Inst. 220.

the same deed, even though the consequence of the application of the law of merger is to deprive the lessee of the privilege annexed to one of his estates, and to confine his right of enjoyment to one life, instead of its having continuance for several lives. Did the lessor propose to give, and the lessee to receive, one continuing estate, or two several and distinct continuing estates? and did the parties intend that the lessee should be privileged from impeachment for waste during the time of the first of these estates? These are the questions which the facts suggest. The answer to these questions is obvious, and admits of no doubt. By the intention of the parties there were to be two continuing estates; and during the existence of the former of these estates, there was to be a privilege of committing waste without impeachment for the same. Though the law acknowledges the creation of the two estates, and admits that they have existence for a time, yet in the next moment of time one of these estates is annihilated, by the application of the doctrine of merger; and the beneficial privilege of committing waste is lost, as a consequence of the annihilation of the estate to which this privilege was annexed.(a)

The cases of a lease for years with a remainder for life, and of an estate to a

(a) 11 Rep. 83.

man, for the life of another person, with remainder to the same grantee for his *own* life, demand further attention. It may at first view appear difficult to limit estates in any other mode, consistently with the intention. However, it may be safely predicated, that the difficulty may be obviated. The limitations might in each instance, have been penned in another form, capable of operation, in a mode which would have excluded all grounds for the application of the law of merger, and at the same time have expressed the particular and precise intention of the parties. To have granted an estate for life, with a remainder for years, to be computed from a given period; for example, from the day next before the day of the date of the indenture, would have accomplished every part of the intention. A limitation in this mode, at the same time that it would have given full effect to the intention, would have preserved the chattel-interest from the influence of merger. (*a*) The lessee would certainly have been intitled to hold the land for his life; and the term of years would have been a continuing estate in the event of his death, within the period of the limited number of years. Except by vesting one of the estates in a trustee, no other mode of limitation would have been consistent

(*a*) 1 Inst. 54. b.

with the intention, and have preserved the term of years. But this form would have been free from objection. The term for years could not by any possible event have merged in the estate for life, because the estate for life was prior to the term for years, and a remainder cannot merge in the *prior* particular estate.

In the instance also of a lease (*a*) to one for the life of another person, with remainder to himself for his own life, the application of the learning on merger, might have been prevented, by limiting the lands to the lessee for the lives of himself and the other *cestui que vie;* by one connected clause, giving one entire estate, to continue for the several lives; or by limiting to the lessee first an estate for his *own* life, and secondly an estate to continue for the other life. Under either form of limitation, there might have been a grant of the privilege of being exempt from waste during the period of the life of the *cestui que vie.*—The former mode of limitation would have given one entire estate, and not several estates; and by the latter mode the estate in remainder would, in the intendment of law, and with a view to the learning of merger, have been less than the preceding estate: and on that account the prior estate

(*a*) Rosse's Case, 5 Rep. 14. Utty Dale's Case, Cro. Eliz. Seymour's Case, 10 Rep.

would not have the capability of merger in the latter of these estates.

On cases of this description some further observations will be introduced, in different parts of this essay.

But though the intention is not the foundation or governing principle of the rule, yet there are many instances in which from favour to the intention, the law of merger is held to be inapplicable. It was in this sense, and with a view to such circumstances, that the expression at the commencement of this chapter was in all probability used.—Therefore, a contingent remainder created by a will, will not be defeated by a descent from the testator of the reversion in fee to the tenant for life whose estate precedes and supports the remainder: and a joint-tenancy to two or more of particular estates, will not be severed by a limitation of a remainder to one of them, in the same deed or will, which creates the particular estate. (*b*)

(*b*) Wiscot's case, 2 Rep. 60.

CHAP. VI.

An Enumeration of the Circumstances which must concur in order to accomplish the Operation of the Law of Merger.

FOLLOWING the points of difference suggested by the determined cases, and by opinions of acknowledged authority, the conclusion from these cases and opinions to the law on merger seems to be,

First, Two or more estates must meet in the same person, in the same lands, &c. or in the same part of the same lands, &c.

Secondly, The more remote estate must be the next vested estate in remainder or reversion, without any intervening vested estate; and also without any intervening interest by way of contingent remainder, created in the same instant of time, or by the same act which gives origin to the other estates.

Thirdly, The estate in reversion or re-

mainder must be as large as, or larger than, the preceding estate.

Fourthly, The several estates must be held in the same legal right; or when the estates are held in different legal rights, one of them must not be an accession to the other, merely by act of law.

Fifthly, The estate must not be privileged, either under the statute of uses, or the statute of intails.

Sixthly, The doctrine will not have effect, to alter the quality of one of two estates, in the same person, or to destroy a contingent remainder, when the several estates are limited, by the same deed or instrument, or take their effect in the same instant of time, and in some degree, by the same act, and some other person is concerned in the consequence of the merger.

Seventhly, The doctrine does not apply to an estate for several lives, arising under the same limitation, as giving one undivided and entire time of continuance.

And, Eighthly, The union of two estates in the same person, by means of the joint act, of the respective owners of these estates, with an intention that the estate of their assignee should continue for the collective time of their several estates, will not be a cause of merger.

After examining these heads, and by that means introducing the circumstances, which, in a general point of view, give rise to the application of the doctrine of merger, or exclude it, some observations on its effect, will be added to shew,

First, The manner in which the doctrine affects the party himself, whose estate is merged.

Secondly, The situation in which it leaves other persons, who have any claims on the estate which is merged, or any interests derived out of the same estate.

Thirdly, The effect which it produces on the estate, in which the merger takes place.

This arrangement will afford scope for observing on the mode, the degree, and the circumstances in which this doctrine affects persons who are,

1st, First and second mortgagees.

2d, Persons who have purchased from bankrupts.

3d, Persons who have estates in reversion.

4th, Persons who have estates in remainder.

5th, Who have estates by intireties.

6th, Who have joint estates.

7th, Who have estates in common.

8th, Who have estates in coparcenary.

9th, Who have interests in contingency.

10th, Who have interests by executory devise, or by executory bequest.

11th, Who have estates on condition.

12th, Who are releasees, &c. to uses.

13th, Who have estates tail.

14th, Who have estates in right of their wives, and also of themselves.

15th, Who have estates as executors or administrators, and also in their own right.

16th, Who have several estates;—one in their individual capacity: another in their corporate capacity.

17th, Who have titles by curtesy.

18th, Who have titles to dower.

19th, Who have estates to be enlarged on condition.

20th, Who have estates to be enlarged.

1st, By confirmation.

2d, By release.

21st, Who are copyholders.

22d, Who claim by descent.

23d. Who are in *ventre sa mere.*

24th, Who have collateral interests or derivative estates.

25th, Who have equitable estates.

26th, Who are creditors.

27th, Who have equitable interests.

28th, Who have legal, and equitable interests united.

29th, Who have a prior title, and who are interested in, or may be affected by, the consequences of a merger.

And lastly, And generally persons who have collateral claims upon, or interests derived out of both, or either of the estates which are united: and under this head the *acceleration* of the estate in reversion or remainder as a consequence of the merger may be considered.

CHAP. VIII.

That there must be two Estates in the same Person.

FIRST, To call the doctrine of merger into effect, there must of necessity, and at least, be two estates. On this head the law is positive; indeed it is demonstrably clear, that unless there are two estates, in the same person in the same land, there is not any estate in that person to merge, or occasion a merger. A *mere* right or *title* will not suffice. (*a*) Therefore, where tenant in tail discontinued, by granting an estate for life, and died without issue, in the life-time of the tenant for life, and the tenant for life surrendered or granted his estate, to the person intitled under the remainder expectant on the estate tail, the estate for life, and consequently the new reversion expectant thereon still continued: for the remainder-man

(*a*) Pauling and Hardy, Skin. 3. 62. Com. Dig. Surr.

was not remitted, and till remitted, he had not any estate in which the tenancy for life could merge.

The estate of the tenant for life, and the right of the remainder-man, depended on distinct titles. The right of the tenant in tail arose from the original gift, and from an estate which was discontinued and turned to a right. The estate of the tenant for life was derived out of the tortious fee acquired by the discontinuance. The reversion in fee expectant on the estate for life, was in the heir or assignee of the lessor of that estate, and such heir or assignee was the only person capable of a surrender, or in whose estate the tenancy for life could merge. No act of the tenant for life, excepting a tortious alienation divesting the estate, and creating a new and wrongful title, could prejudice the owner of that reversion. To defeat the estate for life, and the wrongful reversion expectant on that estate, the remainder-man must prosecute a real action. By these means alone can he restore himself to the seisin under his original title. No conveyance by the tenant for life, or entry, can avail the rightful owner of the estate-tail, to the extent of recovering his rightful ownership. Disseisin after disseisin, may be committed; but till there shall be a recovery in a real action on the footing

of the old intail, or a *remitter* by act of law to that intail, the old intail will be dormant. It follows, under a title thus circumstanced, that while the discontinuance remains in force, the owner under the intail, cannot confirm the title of the tenant for life, by suffering a common recovery brought against the donee in tail, as *tenant* of the freehold, because he is not seised of an estate tail in posession. That a recovery may operate, the tenant in tail must be vouched, and for that purpose the freehold must be conveyed to some other person, that the writ of entry may be sued against that person, and that he may vouch the tenant in tail and the donee vouch over: or the writ of entry may be brought immediately against the tenant for life, and he may vouch the donee in tail in remainder, and thus the right under the intail, and under all remainders, which were expectant on the same, may be barred. (*b*)

(*b*) Taltarum's Case, 12 Ed. 4.14. 19. Lincoln Coll. Case, 3 Rep. 58. Peck v. Channell, Cro. Eliz. 827. Preston's Conveyancing, 1 Vol. 123.

CHAP. VIII.

Of Limitations, giving distinct Estates.

INSTANCES in which the question may arise, whether a man has one estate or two estates, cannot occur very frequently. In a few cases, the question has arisen with a view to the doctrine under consideration.

Thus in *Rosse's* case, (*c*) a lease was made to A. and his assigns, habendum to him during his life, and the lives of B. and C.

The question was, whether this grant during the lives of B. and C. was void. The decision was in favour of the limitation. It was objected that when a man had two estates in him, the greater should drown the less, and that an estate for the life of the lessee, was higher than for the life of another, and that therefore the estate for his own life and for the

(c) 5 Rep. 13. Roos v. Atwood, Cro. Eliz. 491. Rosse v. Ardwick, Golds. 187. Moor, 398. and 15 Vin. 366. S. C. Bowles v. Poor, Cro. Jac. 282. Ess. on Est. Chap. Life.

lives of others, could not stand together. The answer given, and resolution of the court were, that the lessee had only one estate, which had this limitation, *scil.* during his life, and the lives of the two others, and that he had *only one freehold*; and therefore there could be no drowning of estates: and the opinion of the court was, that the lessee had an estate of freehold to continue during their three lives, and the life of the survivor of them. The point on the *continuance* of the estate had been previously settled in *Utty Dale's* case. (*d*)

Another instance in which it has been doubted, and seems at this instant to be doubtful, whether the party has one estate or several estates, is, when there is a limitation to two persons, jointly, with a subsequent limitation to one of them for an extended interest.

The cases on this point are connected in some degree with the law on merger; and as they relate to the time and degree of possession, and may involve the law on merger, they are deserving of consideration. (*e*)

It is the language of Mr. Fearne, that if the particular estate be to A. and B.

(*d*) Cro. Eliz. 182.

(*e*) Rule in Shelley's Case, 87, 88, 89.

for their lives, and after their deaths, to the heirs of B. or to the husband and wife, and the heirs of the body of the husband, or to two men and the heirs of their two bodies, or the heirs of the body of one of them; the estates in tail, or in fee, are said to be executed *sub modo*, that is, to some purposes, though not to all; for though they are so far executed in, or blended with, the possession, as not to be grantable away from or without the freehold, by way of remainder, yet they are not so executed in possession as to sever the jointure, or to intitle the wife of the person so taking the inheritance to dower: and it is to be observed, that without a merger of the estate for life, there could be no title of dower. To a claim of dower, a joint seisin of the freehold would be a complete answer.

In a former paragraph, (*f*) Mr. Fearne has advanced these positions:—When there is a joint limitation of the freehold to several, followed up by a joint limitation of the inheritance in fee-simple, to them, as an estate to A. and B. for their lives or in tail, and afterwards to their heirs, so that both limitations are of the same quality, that is, both joint, it seems the

(*f*) See 1 Inst. 182. b.

fee vests in them jointly; and so if the limitation be to the baron and feme jointly, remainder to the heirs of their bodies, it is an estate tail executed in them as they are capable of issue, to whom such inheritance can descend; but if the limitation of the freehold be not to them jointly, but successively, as to one for life, remainder to the other for life, remainder to the heirs of their bodies, (g) there it seems the ultimate limitation is not executed in possession, but gives them a remainder in tail. That the ancestor has *several and distinct* estates, or one entire estate, is the point to be considered, and the difference seems to be, that when the ancestors have a joint estate, and the limitation is to the heirs of one of them, by one connected and continued clause of limitation, the freehold and inheritance will be one entire, and, during their joint-lives, *inseparable* interest; (h) and that when the estates to the tenant for life, are several and distinct, to take place successively, and the limitation is to the heirs of the first tenant for life, or to the heirs of both the tenants for life, as in *Stephens v. Bretridge*, (i) the limitation to the heirs will give a distinct interest by way of remainder.

(g) Stephens v. Bretridge, 1 Lev. 36.

(h) Mandeville's Case, 1 Inst. 26. b,

(i) 1 Lev. 36.

The language of Mr. *Fearne*, favors this distinction,(*k*) and even supports it. The next consideration is, whether the inheritance may be distinct from the freehold, when the limitations are to two persons, and after both their deceases, or after the decease of one of them, (when they have an estate for their *joint* lives) to the heirs of one of them. Let us examine the authorities on this point, and the reasoning on which they depend.

First, *Littleton* (*l*) says, there may be some joint-tenants which have a joint-estate, and be joint-tenants for term of their lives, and yet have several inheritances. His example is of a gift to two men, and to the heirs of their two bodies begotten; and Lord *Coke* in elucidation of the text, observes, "albeit they have "several inheritances in tail, and a par-"ticular estate for their lives, yet the "inheritance doth not execute and *so* "*break the joint-tenancy; but they are* "joint-tenants for life, and tenants in "common of the inheritance in tail."

The observation to be made on this case is, that the freehold and the inheritance were limited by one single and continued

(*k*) See Shelley's Case.
(*l*) s. 283.

sentence. Though it is not, asserted, yet it is virtually admitted, that the freehold and inheritance of each person, formed an *entire* estate, so that the freehold and inheritance were not distinct. It is true the donees were joint-tenants of the freehold, and severally seized by moieties of the inheritance; but then the moiety of each tenant of the inheritance, was attached to the freehold of that tenant, and so far formed one entire estate, as to be inseparable by any act of the party; but on the death of one of the joint-tenants, leaving issue, then the joint-tenancy carried the immediate freehold to the other tenant, and the issue of the deceased donee in tail became seized of the inheritance, as a distinct interest, and by way of remainder. Unless this be the situation of the issue in tail, no name can be given to the quality of their estate by which it can be distinguished. (*m*)

Secondly, In *Wiscot's* case, (*n*) it was said, "if a man make an estate to three, and to "the heirs of one of them, there one of them "hath fee-simple, and yet the jointure "doth continue, for all is but *one entire* "*estate*, created at the same time, and there-

(*m*) Littleton, or Lord Coke himself, calls it a Remainder; and see Mandeville's Case, 1 Inst. 26.

(*n*) 2 Rep. 60.

" fore the fee-simple cannot drown the join-
" ture, which took effect with the creation
" of the *remainder* in fee." Even under these circumstances, the inheritance is called a remainder. Of course it is a remainder by the construction of law.

In the same case, it was said that when an estate is made to three, and to the heirs of one of them, and he who hath the fee dieth, and one of the survivors purchaseth the remainder, the jointure is severed.

This proposition proves that in the case cited from *Littleton*, the inheritance may eventually become distinct from the freehold, and that though in the first place it was conjoined to the freehold, it may, at a subsequent period, be separated from the same, by act of law, though not by way of conveyance. And in the same case, it was asserted, that when an estate is made to three, and to the heirs of one, he who hath the fee, cannot grant over his remainder, and continue in himself an estate for life. (*o*) But it was admitted that if there be tenant in tail, the remainder to his right heirs, he may grant his remainder over or devise it. (*p*) The only difference, observable in these cases, is, that in the former instance the freehold and the inheritance

(*o*) 12 Ed. 4. 26.
(*p*) 27 Ass. 60. 2 Rep. 60.

were limited by one connected, and undivided clause, while in the latter instance, the remainder in fee was distinct from the estate-tail by the form of the limitation, and also as a consequence that an intail and a fee-simple in the same person, must necessarily give *several* estates, while this necessity does not exist as to other estates, since an estate of freehold, held in joint-tenancy for life, may form an inseparable part of the same estate, considered as conferring an inheritable quality subject to the joint-tenancy.

In a note to the Vinerian lectures Mr. *Wooddeson* refers to the text cited from *Fearne*, and observes that if the particular estate be to A. and B. jointly for their lives, remainder to the heirs of the body of B. this will be an estate-tail in B. executed in B, so as to make the inheritance *not grantable distinct* from the particular estate of freehold by way of *remainder*, but on the other hand not to sever the jointure or intitle the wife of B. to dower.

It is obvious that the forms of gifts stated by Mr. Fearne are differently penned. One of the examples, is of an estate to A. and B. for their lives, *and after their deaths*, to the heirs of B. so that the limitation to the heirs is distinct from the limitation to the ancestor; and this is the very example on which Mr. *Wooddeson* has fixed for the appli-

cation of his conclusion, or perhaps, of the general conclusion of Mr. *Fearne*, to the several cases he had cited in that passage.

In the other instances noticed in that passage, the gift was extended to the heirs, by one *undivided and connected clause* of limitation to them and the ancestors; and perhaps it was to these instances alone, that Mr. *Fearne* intended to confine his observation, that the interest imported by the limitation to the heirs, was not grantable away from, or without the freehold, by way of remainder. Without ascribing this intention to him, it is difficult to support his doctrine by any authority to be collected from the books on the subject.

The words, introducing the limitation to take place after the decease of the tenant for life, have a strong tendency to express a distinct estate, partaking of the nature and properties of a remainder. Does the law, it may be asked, preclude the right of an individual, to have an estate of freehold in himself jointly with another, with a *distinct estate*-tail, or a distinct fee, by way of remainder? No authority can be adduced against the existence of the two estates distinctly, when an intention that the inheritance and the freehold shall be distinct, is apparent. As often as the limitation to the ancestor extends the benefit of that limita-

tion to his heirs, there is reason to contend that the ancestor has one estate, and one estate only; and then the law denies to him the privilege of disposing of the inheritance; and at the same time, reserving the freehold. Nothing seems to be more clear, than that when *several* limitations give *distinct* estates, the remote estates, depending on estates more immediate, and created at the same time, and by the same deed or will, must be *remainders*; and being distinct estates, they must assume the description of remainders, and, answering this description, no objection can be made to the transfer of these remote estates separately from the estates of freehold, as *remainders*; and when the estate has the name, and all the qualities of a *remainder*, and (for this is the essential point and distinguishing circumstance) is *distinct* from the estate of freehold, what reason, or what authority can be urged against its conferring the same privileges, as are annexed to other estates of the same denomination? It follows, that the interest which passes by the limitation to the heirs is improperly called a remainder, or it has all the qualities common to estates comprehended under and embraced by that term.

Now the authority of *Littleton* and *Perkins*, and also the determination of *Wiscot's* case, will support the right of a person who

is the owner of several distinct estates, to alien one of these estates and retain the other. Thus in treating of attornment. *Littleton* says, " If a lease be made for life, " the remainder to another in tail, the re- " mainder over to the right heirs of the " tenant for life, in this case, if the tenant " for life grant his *remainder* in fee to " another by his deed, this remainder *main-* " *tenant*, passeth by the deed without any " attornment, &c. for that if any ought to " attorn in this case, it should be the tenant " for life, and in vain it were that he should " attorn upon his own grant," &c. It is evident that *Littleton* is treating of a grant of the remainder, distinct from the free-hold. That the freehold continues in the tenant for life, is the reason, superseding the necessity of attornment. To convey the freehold and inheritance, a feoffment and not a grant would be the proper mode of assurance.

And according to *Perkins*,(*d*) confirmed by the resolution in *Wiscot's* case ; if a tenant in tail be seised of an acre of land, the re-mainder of the same acre to his right heirs, he may grant this remainder, and yet it is not executed in him.

By the observation in *Perkins*, that the estate to the heirs was not executed in the

(*d*) Sect. 88.

tenant in tail, it must be understood that the remainder was not vested in possession. Under the rule in *Shelley's* case, it was clearly vested in interest.

From this examination of the authorities, there is some reason at least for the conclusion, that in those cases in which a grant or limitation is made to two jointly, and the heirs of one of them, the limitation to the heirs will give the interest to their ancestor, so as to be connected with, and form part of the estate of freehold, subject to the interest of the joint-tenant, or, by way of remainder, according to the form which the limitation assumes, and the circumstance that it connects the nomination of the heirs with the nomination of the ancestor, as to two jointly, and the heirs, or heirs of the body of one of them, or makes a distinction between the several limitations and the times at which they are to confer the right of enjoyment, as to two jointly, and after their decease, to the heirs of one of them; and for the further conclusion, that when the limitations to the ancestor, and to his heirs, give distinct estates, he may dispose of either of these estates, and at the same time retain the other.

The inference from these positions to merger, may not be obvious to every reader. The object of the present investigation, is to shew the instances in which a

person claiming under several limitations in these various forms, is seised of an estate-tail, by way of immediate estate, and when of an estate for life only, with a remainder in tail, and consequently of two estates.

This point has been agitated most generally in reference to estates tail, when it has been necessary to consider whether the donee had or had not an estate-tail in possession, so that he could discontinue the estate-tail, or bar the remainders by a recovery, in which he was tenant and not vouchee.

In *Owen's* case (*e*) the husband and wife were seised under limitations, to them and the heirs of the body of the husband, and the husband alone suffered a common recovery in which he was *tenant*, and consequently with single voucher; and on the ground that his wife had a joint estate with him, and that there are no moieties between husband and wife, it was held that the recovery did not bar the issue, and remainder-men.

And in the Marquis of *Winchester's* case, (*f*) limitations were made to a man and a woman, not his wife, and the heirs of the body of the man; and a recovery he suffered with single voucher, and conse-

(*e*) 3 Rep. 5. Moor, 210.
(*f*) 3 Rep. 1.

quently *as tenant* was held to be good for one moiety. These cases were determined on the ground, that the man had not in the case of *Owen*, an estate-tail in possession in any part, and that in the case of the Marquis of *Winchester*, he had an estate-tail in possession of one moiety only.—And yet in the case of *King v. Edwards*, (g) where a man and his wife were seised to them, and the heirs, of the body of the man, with remainder to E. B. and the heirs of his body, with remainder to W. B. and the heirs of his body, it was held, that the estate-tail was so far executed in possession, that a feoffment by the husband and wife created a discontinuance, although W. B., the third remainder-man, joined in the feoffment. The principal question was, whether this feoffment was a discontinuance of the estate-tail; and it was argued for the defendant that it was not any discontinuance; for it was said, the husband during the coverture, having a joint-estate, with his wife in the freehold, had not any estate-tail in possession, but *quasi* a remainder in tail expectant upon a joint-estate for life, and not executed: so then not being seised of the estate-tail in possession, the feoffment could not make a discontinuance; and to prove that, the counsel cited 3 Rep. 5.

(g) Cro. Car. 320.

Owen and Morgan's case; and 2 Rep. 61, *Wiscot's* case. But as to that point *Richardson, Berkeley,* and *Croke,* contrary to the opinion of *Jones,* held, that the estate-tail was in the husband vested and settled, and that his, and his wife's feoffment made a discontinuance; and although it was objected, that W. B. the third in remainder, joined in the said feoffment, so as it could not make a discontinuance, but that every of them respectively passed their estates, yet all the justices agreed that this joining of W. B. was not material, for there was an intermediate remainder in tail to E.B. which was discontinued.

In *Clithero v. Franklin et Ux,* (a) in a writ of ayel, the issue was, whether the grandfather died seised in fee? The jury found that the grandfather covenanted to stand seised to the use of himself, and *Mary* his wife, for their lives, remainder to the heirs male of the grandfather, on the body of the said *Mary begotten,* with remainders over: the grandfather suffered a common recovery, and died; *Mary* survived. To prove the recovery void, it was insisted that *Owen and Morgan's* case was not law; for if baron and feme had an entirety, then each had the whole, and the baron might make a tenant to the

(a) 2 Salk. 568.

præcipe for the whole. *Pemberton, contrà,* that case was never yet questioned; the wife's estate hinders the intail from executing in the baron; so that it is only a kind of contingent estate, after the death of the wife, and the intail cannot be tacked to the estate for life, of the husband during the life of the wife; because during her life, there is an intervening estate; and it was accordingly adjudged.

Clithero v. Franklin, is very inaccurately reported. It must be read as a case of a recovery in which the grandfather was tenant, and not vouchee.

Even then, how lamentable it is, that a science so essential to the happiness of society, should be perplexed with such absurdities and contrarieties!!

There is another case, (*b*) in which the question was agitated, whether the grantee had *one* estate or *several estates*: and that question does not appear to have been decided; so that at this instant there is not any direct authority which affords a solution of the law applicable to a case with those circumstances.

As cases of this sort often occur in those counties, in which it is the practice to grant leases for years, determinable on lives, a statement of the material parts of that case,

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(*b*) Henning v. Brabason, 2 Lev. 45.

and the observations relevant to the same, will be introduced.

The Earl of *Meath* leased lands to A. to hold to A. for eighty-one years from Michaelmas next following, if he should so long live, and from and after the day of the death of A. for thirty-one years. The lessee entered before the commencement of the term; and continued in possession for some time. After the period limited for the commencement of the lease, the lessor re-entered, and the lessee being out of possession, and when by the rule of law he had not any assignable interest, except so far as the thirty-one years were to have effect, as an *interesse termini*, and not as an actual estate, assigned his term.

On an ejectment after the death of A. by the person claiming under the assignment, *Bridgman*, chief justice, delivered the opinion of the court. And the second question in that case being what estate this term for thirty-one years was, he held this a continuance of the first term, and an addition thereto, and not a remainder (c) or future interest, but thirty-one years added to the first, *all being under one habendum;* but some of his brethren, he

(c) See Vin. Abr. Executor U. on this point.

observed, differed from him on this point; but he took it so, although the most strong against him (viz. his conclusion on the merits of the cause.) And although the thirty-one years were not from the time of the death of A. but from the *day of his death*, this is the same; for the whole day upon which he died is part of the first eighty-one years, if he should so long live, and the next thirty-one years shall be adjoined to this, and no fraction of a day, but the last day of the eighty-one years, and the first day of the thirty-one years shall be conjoined, and make only one term; and it is not to be supposed that he should survive eighty-one years. and by that means one term end before the commencement of the other. But if the first term had been only for thirty or forty years, then it should be otherwise, but not so on a term for eighty-one years; and so he concluded that *both the terms being to the same person, they made only one term*, as a lease to one for three years, and so from three years to three years, makes one term for six years; but if the thirty-one years had been to *another person*, this should be a remainder or future interest; and he said all his brethren agreed with him, that it could not be presumed, that the lessor would survive the term of

eighty-one years. The like presumption has been made in other cases. (*d*)

To bring a case under the influence of the reasoning on which the chief justice relied, there must be an immediate connection between the times of the several terms. An interval between the several times would necessarily lead to the conclusion that the several times were to give distinct estates. The elucidation of these limitations, by comparing them to a lease for three years, and from three years to three years, is peculiarly neat and apposite. Leases for three years, and from three years to three years, especially when they are carried on for an indefinite period, referred to the pleasure of the parties, are analogous to leases from year to year. The only difference is, that in one case three years, and in the other case, one year, are the period of computation. Leases from year to year, deserve some notice under this division. At first view they appear to give several distinct estates. In truth they give only one time of continuance. That time, however, may be confined to one year, or extended to several years, according to circumstances attending the tenancy in its

(*d*) Pollexf. 67. Beverley v. Beverley, 2 Vern. 131. Peahy v. Hurrell, 2 Vern. 370. Evans v. Weston, Butler's Fearne, Appendix, No. 1.

progress.—In the first place, the lease is for one year certain, and, after the commencement of every year, or perhaps after the expiration of that part of the year in which a notice of determining the tenancy may be given, it is a lease for the second year; and in consequence of the original agreement of the parties, every year of the tenancy constitutes part of the lease, and, eventually, becomes parcel of the term; so that a lease which, in the first instance, is only for one year certain, may in event, be a term for one thousand years. (e)

Under this species of tenancy the law considers the lease with a view to the *time which has elapsed* as arising from an estate for all that time, including the current year; and with a view to the time *to come*, as a lease from year to year. For as all the time for which the land may be held under a *running* lease, is originally given, and in effect passes, by the same instrument or contract, the whole time is consolidated, and every year, as it commences, forms part of the term. (e)

It is also to be observed, that in some cases *a limitation by joint words may give several estates*.(g)

Thus, by a gift to a man and *the* heirs

(e) Essay on Estates, Chap. Years.

(g) See Mandeville's case, 1 Inst. 26. b. Succinct view of the rule in Shelley's case, 24.

of the body of his father; or by a gift to a woman and the heirs of the body of her deceased husband, several estates are created. That a man may be tenant in tail, as *donee* by *name*, the gift must be to him and the heirs of his own body. A consequence flowing from this position is, that under a gift to a man and his heirs of the body of his father, the words "of the body of his father," are inconsistent with the gift to him and his heirs, therefore he takes the fee-simple, and the words, "of the body of his father," are rejected for repugnancy. In a gift to a man and the heirs of *the* body of his father, this inconsistency does not exist.

The persons designated to take under the appellation of heirs, are *the heirs* of the body of his father, and not the heirs of the donee, or his heirs of the body of his father. A gift *to his* heirs of the body of his father, if it created an intail in the heirs of the body of the father, might postpone, and for a time exclude the right of enjoyment of the descendants of the son, and at all events, would admit other persons besides *his issue* to the succession under the intail. A gift to the heirs of the body of the father, though in terms it is conjoined with the gift to the son, is, in point of law, distinct from and independent of that limitation, for

that reason this single limitation passes several and distinct estates.

The donee, by reason that he is named, will take an estate for his own life; and, under the limitation to the heirs of the body of his father, an estate-tail will vest in the person who can bring himself within that description. The donee himself may answer the description; and in that case he will take an estate-tail. This estate, however, will not vest in him, because he is the donee particularly named. When it vests in him, it will be on the ground that he answers the description of the gift to *the heirs* of the body of his father; for any other person answering that description, may take in preference to this son, the donee; and if the father be living, the limitation to the heirs of his body will give a contingent interest, suspended from vesting till his death. It is to be observed, however, that though the intail may vest by purchase in any one answering the description of the limitation to the heirs, any other person who might have taken under a gift vesting an estate-tail in the ancestor, may take under this limitation, though he is not the general heir of that ancestor. (*h*)

(*h*) Mandeville's Case, 1 Inst. 26. b. Southcot v. Stewell, 2 Mod. 207. Willis and Palmer, 5 Burr. 2615. View of the Rule in Shelley's Case, 24.

Again, a limitation by one entire connected clause to A. for life, and for years beyond the life, gives several estates; a freehold and chattel real:(i) and one estate is perfectly distinct from the other, and the assurance for the transfer of these estates must be adapted to the different qualities of the interest. In consequence of accounting the term for years distinct from the estate for life, the term may merge in another estate, without drawing with it the estate of freehold, or being exempt from merger, as forming part of that estate, on the ground that the estate for life of A. could not merge in another estate, because that other estate was not of sufficient extent, to cause the merger of the estate for life, though it was sufficient to cause a merger of the term for years. Besides, when the estate of freehold, limited in conjoint expression, with the term for years, is an estate *pour autre vie*, and limited to the heirs, as special occupants, then on the death of the tenant for life, the estate of freehold will devolve to the heirs, and the estate for years will vest in the executors. Accordingly, in *Mordant v. Watts*, (k) it is said, if I grant an annuity

(i) Vin. Abr. Executor, U. Brownl. 19.
(k) Id. ibid.

for life, and twenty years after, these are several grants, and the executors shall have it after the death of the tenant for life. By several grants, it must be understood, that the instrument gives several and distinct estates, in the same manner as if two estates were limited by divided clauses. In the principal case before the court, the grant was to A. his heirs and executors for the life of another person, and for half a year after; and the court said, if the grantee had died, his *heir should* have had the rent during the life of the stranger, because, it was payable to him, *his heirs* and executors; but neither of these points was material to the judgment. The question debated and decided, related to the times of payment, in consequence of the death of the *cestui que vie* in the lifetime of the grantee. *Cranmer's* case (*i*) must receive attention, since if it be law, heirs *eo nomine* took the term by purchase.

The opinion expressed on the points now under consideration, is intitled to attention. No other authorities, either for the affirmative or the negative of the proposition have occurred. The expressions, therefore, in *Mordant v. Watts*, are most likely to be resorted to, and weighed,

(*i*) 2 Leo. 6. Vin. Abr. Executor, U. pl. 20, 21.

whenever the question shall be litigated. But it is probable, that the opinion in *Mordant v. Watts* will always be considered too clear and too well founded, to afford the most distant hopes of success, in an attempt to impeach its authority. To say that a freehold is a chattel, or that a chattel is a freehold, is absurd; and the same estate cannot be freehold at one time, and a chattel at another time. At least, it is more reasonable to say, there are several estates; one wholly and completely freehold, the other wholly and completely of a chattel quality. The consequence will be, that though the limitation gives a continued time of enjoyment, without any interval, yet in the intendment of law, there is a several distinct ownership under each estate, and the years may merge in a more remote estate, notwithstanding the estate of freehold may still remain a continuing, separate, and distinct interest. Besides, is it not reasonable that the years may pass without carrying the estate for life? The intention may sometimes call for this construction; and what rule or policy of law denies the application of it? Because an instrument is insufficient to pass the time of the estate for life, either for want of livery of seisin, or for want of a lease for a year, to raise an estate capable of being enlarged by a release, or for any

other reason peculiar to estates of freehold, shall the instrument be also void as to the time of the year, though there be an express limitation of that time? And yet that the term should not pass under these circumstances, is a necessary consequence of admitting that the several periods, of the life, and the year, are constituent parts of one entire estate.

The observations on this case are not, by any means, inconsistent with the opinion of chief justice *Bridgman*. The two cases are essentially different. In the case before that judge, both interests were of a chattel quality. In the case under consideration, one estate is freehold, the other chattel; interests so dissimilar, communicating qualities so totally different, that union between them, as parts of an entire estate, seems incompatible.

In reference to the rule in *Shelley's* case it may be observed, that, when the limitations to the ancestor and the heirs are immediate, or eventually become so, by the determination or failure of intermediate estates, the several interests imported by these limitations, will consolidate, and, by merger, become one intire estate, giving one undivided time of continuance. When other estates are limited intermediately, the limitation to the heirs, will, during the existence of

these estates, give to the ancestor an estate in remainder, to take effect in possession, according to the order in which it is limited, in subordination to, and after the determination of the intermediate estates by which it is preceded, excepting only those instances which are the same in principle, or in circumstances, as the case of *Lewis Bowles*. (*k*) In that case all the remainders limited mediately between several gifts, one to a man and his wife for their lives, the other to their heirs of their bodies, were contingent; and it was held that an estate-tail did execute in the husband and wife, so as to entitle them to be deemed tenants of an estate-tail in possession: but *sub modo*: so that, on the vesting of the contingent interests, the husband and wife should be tenants for their lives with a remote remainder in tail.

Even though the several limitations had been so made as to be operative, without the aid of the rule in *Shelley's* case; for example, by a remainder to the donee and his heirs or the heirs of his body, the like temporary union and consolidation would have taken place, so as to open and let in the contingent remainders, when *and if* they should become capable of effect.

(*k*) 11 Rep. 80.

These are instances of merger which are conditional and not absolute. The cases of *Lewis Bowles*, (*l*) and *Hooker v. Hooker*, (*m*) and *Cordal's* case, (*n*) afford the material authorities, and they are relevant to the doctrine of merger as it affects contingent remainders, dower, curtesy, &c.

That the Accession of a third or intermediate Estate may be the Cause of Merger, as between two or more other Estates.

The law of merger may operate between three or more estates, as well as between two estates.—A third estate may be, and frequently is, the means of the union of two estates, and the merger of one of them, when they would otherwise be kept apart and remain distinct. This observation will become intelligible, by supposing A. to be tenant for life, with remainder to B. for life, with remainder to A. in fee: or by supposing B. to be tenant for life, with remainder to A. for life, with remainder to B. in fee.

In the former case, the intermediate estate

(*l*) 11 Rep. 80.
(*m*) Rep. Temp. Hardw. Ann. 13.
(*n*) Cro. Eliz. 315.

of B. will prevent the union of the several estates in A. and in the latter instance, the estates of B. are kept distinct by the estate of A..

This position will be proved by *Bates's* case, (*o*) and the case of *Duncomb and Duncomb*. (*p*) From the doctrine established by these cases, and to be stated in considering the effect of merger in reference to titles by *curtesy* and *dower*, it will be evident, that the right of dower or of curtesy may depend on the application of the law of merger. But with a view to the remarks to be made, on introducing the several cases of *Bates*, and *Duncomb v. Duncomb*, it is observable that, *cæteris paribus*, if in the first instance B. had conveyed his estate for life to A., and in the second instance had conveyed his several estates for life and in fee to A. the three estates would have united and become one entire interest. In each of these cases, the impediment to merger, arise from the intermediate estate, will be and was removed when that estate shall be annihilated by merger. These instances then prove that as to this point, it is immaterial whether the person who has the second or intermediate estate, acquires the first and third estates, or

(*o*) Salk. Lord Raym. 326.
(*p*) 2 Lev. 437.

whether the owner of the first and third estates, becomes tenant of the second or intermediate estate.—And of the circuitous mode in which merger takes place in those instances, some notice will be taken, in considering the other heads of division. The observations to be introduced under these divisions will also illustrate these cases.

That the several Estates must vest in the same Person.

Another circumstance to be noticed under this division is, that the several estates must meet, that is, vest in the same person. Several estates, in distinct persons, will remain several and distinct interests. The union of two or more estates in the same individual, or in two or more persons seized jointly, is the cause of merger.

That the two Estates must be in the same Lands; or in the same part of the same Lands.

These positions require very little explanation. The examples for their illustration, will be easily collected from the subsequent divisions.—The two estates must be in the same lands; or when the lands are held by several persons in undivided parts, then in the *same* parts of these lands. *Several estates in distinct parts*

are not within the rule of merger: and therefore if A. have an estate for life in one moiety, or any other part of a parcel of land, and an estate for life or in tail in the *other moiety*, or any other part of the same land, one of these estates cannot merge in the other. These are several estates in distinct parts; and are to be considered exactly as if they were distinct estates in distinct farms: and the doctrine of merger requires the concurrence of several estates in the same lands, or in the same part of the same lands. This is material in an especial manner to the knowledge of the law of merger, in application to the estates of tenants by entireties, joint-tenants and tenants in common; and as between persons who have estates under cross-remainders. A general rule as to these tenancies, and to be insisted on more fully under an appropriate head of this essay, is, that the *law on merger may operate to the extent in which the same person has several estates in the same parcel of land, or in the same part of one parcel of land.* For the purpose of merger, each person who is tenant by entireties has the entirety of the lands as one individual. Therefore, merger may be in the same manner, and to the same extent, as if there were a *sole* seisin: but joint-tenants have, for the purposes of merger, only aliquot parts;

although for the purposes of surrender or release by one of them, and for many other purposes of tenure, they are seised *per my et per tout*: and tenants in common have only *particular undivided shares*, which as between themselves may be equal or unequal in their extent, and each share is considered as a distinct tenement, and gives a separate and distinct freehold. Therefore, as to joint-tenants, and tenants in common, the merger will not operate beyond the extent of the part in which the owner has two several estates.

That an Estate may merge for one part of the Land and continue in the remaining part of the same Land.

A consequence arising from these deductions is, that an estate may merge for one part of the land: and continue in the remaining part of that land: as if A. be tenant for life, remainder to B. and C. for life, in tail or in fee, and A. convey his estate to B. or C. the estate for life will merge as to one, and continue as to the remaining, moiety of the same land. So when A. and B. are joint-tenants, or tenants in common for life, remainder to C. in fee, and A. conveys his estate for life to C.,

there will be a merger as to one moiety only of the land; and B. will be tenant for life of the other moiety. After merger, B. and C. will be tenants in common of the freehold, and C. will have the inheritance of one moiety as tenant in fee in possession, and of the other moiety as tenant in fee expectant on the decease of B. (q) These instances establish the proposition that merger may be partial; that an estate in an aliquot part of the land, may merge, while the estate in other parts of the same land will be a continuing interest; and from the examples already adduced it will appear that the *merger will not be more extensive than that particular part of the land in which there are* several *successive* estates in *the same* person, without any difference whether the more immediate or the more remote estate comprises a larger portion of the lands.

Inquiry whether several Estates in an equal Share of the same Lands shall be referred to the same Share.

Sometimes it has been doubted whether several distinct estates, in an equal share

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(q) Wiscot's Case, 2 Rep. 60.

of the same lands, should be referred to the *same identical* share of these lands. Thus in *Church v. Edwards*, (r) by settlement dated the 29th and 30th July, 1702, on the marriage of *Pensometh Edwards* with *Hannah Saunders*, lands were settled to the use of *Pensometh Edwards* for life, remainder to *Hannah* for life, remainder to the heirs of *Hannah* to be begotten. This estate-tail *descended* on *Hannah* and *Elizabeth*, the daughters of the marriage. The remainder in fee also descended to them as heirs of their mother's brother, and consequently from a person who had the fee, distinct from the estate-tail. *Hannah*, the daughter, being in possession, levied a fine with proclamations of one moiety and filed a bill in chancery, for partition, and devised the lands; and the present bill was by persons claiming under *Hannah* the daughter, against persons claiming under *Elizabeth*, to revive the proceedings in the former suit. For the defendants, it was contended, that *Hannah*, having a moiety in the estate-tail, the remainder to both sisters in fee, her fine would, as to the remainder in fee, only bind a moiety of that moiety, and not a moiety of the entirety: and it was alleged, that if she had been seised of a moiety in tail, with

(r) 2 Bro. Ch. Cas. 180. also Thrustout v. Peake, 1 Str. 12.

remainder to herself and a stranger in fee, her fine would clearly, as to the remainder in fee, have affected only a moiety of the moiety, and that the question only was, whether the sisters being interested in the estate-tail, as well as the remainder in fee, could make any difference. But by Lrod *Kenyon*, then Master of the Rolls, it was said, "By the fine *Hannah* obtained a base fee "in that moiety, in which she had an "estate-tail. How can you differ the "moiety in which she had the estate-tail "from that in which she had the remainder "in fee? It would be rather curious to "distinguish the one from the other, for "the purpose of depriving her of the moiety "in which she had the estate-tail. The "estate-tail is now spent by the death of "the sisters, and the reversion is fallen in. "But if the defendants think it worth "arguing, I will send a case to the Com-"mon Pleas, upon the question, whether "*Hannah*, under the deeds of 29th and "30th July, 1702, and by her fine, ac-"quired a fee-simple in any and what part "of the estates, settled by those deeds." A case was accordingly sent to the Common Pleas, and argued by Mr. Serjeant *Hill*, and that court was of the same opinion with the Master of the Rolls.

The object of the argument was to shew, that *Hannah* had several estates; one in

a moiety; another in a moiety of her own moiety; and a third in a moiety of the moiety of her sister, in effect, *three estates;* and that her fine applied to a moiety only of that moiety of which she was tenant in tail in possession, and to a moiety of the other moiety in which she was supposed to have a remainder in fee.

And there are cases in which the remainder or reversion may be in a distinct share, though *Church and Edwards* is not an instance of this sort; and there will be a merger, when no reason exists for distinguishing the estates, and there will not be any merger when there is a reason for distinguishing the estates.

When there are several particular estates, there must be several and distinct inheritances. (s) This seems to present the ground for distinguishing the cases in which several persons having the reversion or remainder shall have several estates in the same share or not.

A. and B. were devisees as tenants in common in tail. One of them died in the life-time of the testator, and the reversion descended to the surviving devisee and another co-heir of the testator. On the question whether the surviving devisee had the reversion in

(s) Co. Litt. 183. b, 191. a. Com. Dig. Estates.

fee in the same identical share in which he had the estate-tail, a highly distinguished conveyancer gave his opinion that the surviving devisee had an estate-tail by descent, and one half of the other moiety, being one fourth, by descent; and consequently the reversion of the share of which he was tenant in tail descended to himself and the other co-heir.

Indeed on sound principles, too clear to be mistaken, it should seem, that when there are *distinct moieties*, there must be a distinct reversion of each moiety; since each moiety is a distinct tenement; and there must be a distinct reversion of that moiety. Granting this to be correct, and who can deny it? the reversion must descend to all the co-heirs, and one reversion, or the reversion of one moiety, cannot descend to one co-heir, and the other reversion, in other words, the reversion of the other moiety, cannot descend to the other co-heir. It is against all principle that coheirs should hold in such manner.

When one moiety is granted to A. for life, and the other moiety to B. for life, or in tail, there will be a distinct reversion of each moiety. A devise in like manner, will give the same result. Of each moiety there will be a distinct reversion, and that reversion would descend to the co-heirs.

Though several estates tail were given to different persons, there would, of necessity, be a separate reversion of each share; for the particular estate, in each share, may determine at a different period; and on the determination of the particular estate, the heirs would be entitled to that reversion as heirs. Though the heirs were the donee in tail by will, the rule of law would be equally applicable to them. Each would have a particular estate, and of consequence, there must be a distinct reversion of each separate share, and that reversion would descend to all the coheirs.

These observations originating with the conveyancer, to whom reference has been made, place the question in its true point of view, and refer it to principles of tenure, so well founded and thoroughly acknowledged, that whenever the question shall be again agitated, this reasoning may possibly prevail, since they do not oppugn the reason, or as a consequence the authority, of *Church and Edwards*; for that case, to be consistent with principle, must have been grounded on its peculiar circumstances.

Now on *Church and Edwards* it is observable that the co-parceners in tail had only one estate between them, and there-

fore their seisin of the estate-tail, was as entire as their seisin of the remainder or reversion in fee, and they had only one estate-tail and one immediate remainder or reversion. But when two persons are tenants in common, in tail, or for life, with the reversion in fee to them by descent, they have several particular estates, and for the reason already stated, several reversions; and the consequence of their having several reversions, will be that A. and B. will have a reversion expectant on the estate of A., in his moiety; and A. and B. will have a reversion expectant on the estate of B. in his moiety; at least this would be the case, as between all persons, except A. and B.: and no reason in law occurs for distinguishing their case from that of other persons in reference to the learning of merger. To shew the absurdity and injustice of a contrary rule, A. and B. may be supposed to be tenants in special tail to them and the heirs of their bodies by particular women. Thus one of them might be tenant in tail after possibility of issue extinct, at the time of the descent; and if the reversion would merge his interest in the whole of his share, there would be an inequality in the right of A. and B. under the descent; since A. would take a reversion expectant on an estate

for life, while B. would take a reversion expectant on an estate-tail.

It must also be kept in mind that in *Church and Edwards* the same persons were co-parceners, as well of the estate-tail as of the reversion in fee; and co-parceners constitute only one heir, and they are seised *per my et per tout*, of the estate held in co-parcenary: and they were not seised of the reversion expectant as to one moiety, on the death of one of them without issue, and expectant as to the other moiety, on the death of the other of them without issue; but were seised of the reversion in fee expectant on an estate-tail in the intirety; but when two persons are tenants in common in tail, and the reversion descends to them, then the reversion of each moiety descends to them, and they have one moiety expectant on the estate-tail in that moiety, and the other moiety expectant on the estate-tail in this moiety: and both being so seised of the reversion of each moiety, during the existence of the particular estate in that moiety, both must necessarily become seised in possession on the expiration or determination of the particular estate: and it follows that as both take the reversion of each moiety by descent, neither has a moiety of the reversion expectant on his own estate-tail in that

moiety, but is seised *per my et per tout* with his companion in co-parcenary, of the whole of the reversion expectant as to each of the moieties on the estate-tail in that particular moiety.

Thus in cases like *Church and Edwards*, the reversion in fee descends in co-parcenary, in the same manner, and with the same connexion between the tenants, as they take the estate-tail by descent. They continue seised in co-parcenary of the several estates, and they have their ownership, in and throughout the same share. Neither of the heirs in tail is tenant to himself and the other co-heir, but the several heirs in tail are also the reversioners; and the merger of the particular estate, when it shall no longer be privileged under the statute of intails, will be only a consequence of an ownership in the same part of the same lands; originally under several estates, which the policy of the law blends, as soon as it can, into one entire estate. And it will be found that this construction has been made in application to joint-tenants, (*t*) even when a severance of the joint-tenancy has been the consequence.

On the whole, the general conclusion to

(*t*) 2 Rep. 60. Wiscot's Case.

be drawn from the determination in *Church and Edwards*, is only that several successive estates will be referred to the same share, when there are not any means for distinguishing the application of these estates to different shares. For it is too clear to admit of doubt, that circumstances, and the nature of the title, may impose the necessity of admitting that several estates, conferring a right of possession in different degrees, to equal parts of the same ands, must be applied to *different* parts of these lands. Thus, A. and B. are tenants in common in fee, and A. settles his moiety on C. for life, and B. settles his moiety on D. for life, and the reversion of B. descends to C. the several estates of C. will remain distinct. These estates exist in an equal share of the same lands; but they clearly exist in different shares. This is the protection of the particular estate from merger. As between these estates there is not any connexion or privity in title; no dependance of one estate on the other. The estate for the life of C. is derived from the title of A., while the reversion in fee is derived under the title of B. It is, therefore, impossible for one estate to blend with the other. There is a want of that privity of right, and of title, which is essential to merger. The privity and connexion of title as to the life-estate of C., is between

C. and A. or those who claim under him, and as to the reversion in fee, it is between C. and D.

So when A. and B. are tenants in common, in tail, with cross remainders to them in fee, or in tail, A. has an estate-tail in a moiety, with a remainder in that moiety to his companion: and he and his companion are in a similar situation, as far as relates to the other moiety. That the estate-tail in either of these moieties, may be enlarged into a fee-simple, the tenant in tail of that moiety must suffer a recovery, or they may join in a recovery of the intirety: and when they have the immediate remainder in fee, their fine with proclamations will be effectual to complete the title.

So when A. and B. are tenants in common for life or in tail, with a reversion to C. and D. it seems, as may be collected from former observations, that C. and D. have two distinct reversions; one expectant on the estate of A., the other expectant on the estate of B.: and therefore a title by descent or purchase, derived by A. from C. or D., can only give a title to one moiety of that particular share in which A. has the precedent estate. For to admit that he took the entirety of that share, would be to change the nature of the ownership of the other party; since in-

stead of having a moiety expectant as to one part on the estate of A., and as to the other part expectant on the estate of B., he would have a reversion wholly expectant on the share of one of them only, and consequently a very different degree of ownership: for as to the reversion, the rule must, with the exception of the instance of co-parceners in tail, who in point of law, have only one estate, be the same, whether the particular tenants have equal or unequal estates: for instance, one an estate for life, and the other an estate-tail: and it cannot be supposed that merger should so far injure one of several reversioners, as to give him a reversion expectant wholly on an estate-tail, instead of a reversion, expectant partly on an estate for life. It therefore seems to follow, that as often as one person has a particular estate in part of lands, and the remainder or reversion in that share is in the same person by a purchase or descent, there must be a merger to the extent of that share; since the particular estate, and the remainder or reversion, are united in the same person.

But as often as the remainder or reversion is in *two* or more persons as tenants in common or joint-tenants, then as these persons have a reversion in each share, there can be a merger only for the aliquot

part of the person, who has the remainder or reversion in the same share in which he has the particular estate.

In practice, it is sometimes desirable to vest in each of several persons, tenants in remainder, the freehold of the particular shares, of which they are seised under the remainder. This is especially the case, when the parties are desirous of obtaining a partition in fee at law. Under these circumstances, it is of importance to limit the freehold to them in such manner as will unquestionably give to each person, the freehold of that particular part, in which he has the inheritance in remainder: for unless the demandant and tenant are severally seised in fee of their respective shares, the partition will be binding only till the estate of one of them shall determine, and will not bind those in remainder.

From the case of *Church and Edwards*, and other authorities, there appears ground for contending that the law will of itself, appropriate to each person, the freehold of the particular share, in which he has the remainder. But since these authorities are not universally relied on, and seem to admit of exceptions, it will in practice be right to remove from titles all causes for doubt, arising from the want of an express appropriation of the freehold to the particular share in which each remainder-man

has his estate of inheritance, and words of appropriation of the freehold to the inheritance will be proper.

The words, "and as to, for, and concerning all that part or share of and in the said messuages, &c. in which the said A. hath an estate of inheritance in remainder as aforesaid, and of and in every part,' &c. to the use of the said A. his heirs and assigns;" or with such other variation, as the circumstances may require.

In this place, and as relevant to these observations, the case of *Oakley v. Smith* (*a*) may be stated. In that case two persons, tenants in common, in tail, of a copyhold tenement, agreed on a partition, and by that agreement, each tenant was to have particular parcels of the copyhold, and afterwards each person made a surrender to the other, of the parcels allotted for that person. *Smith*, the eldest son of one of the tenants in tail, contended that the intail subsisted in a moiety of the original moiety of his mother: thereby meaning the moiety of the entirety of those lands, which were allotted to her; and on a rehearing lord keeper *Henley* made a decree in his favor, on the ground that the several daughters only barred a moiety of their respective estates, viz. allotments; and this decree was

(*a*) Ambler, 368.

perfectly right in principle. It may be supported by the strongest arguments. As to the particular lands, surrendered by each tenant in common, that person was tenant in tail of one moiety only thereof.

Therefore as to the intail no more was affected by the surrender, than the lands comprised in the surrender, since the surrender of each daughter, did as to the intail pass only her original moiety of the particular lands contained in her own surrender: and not the moiety of those lands which, on the partition, were allotted to herself: so that although the several surrenders comprised all the lands, yet the surrender of each tenant in tail, was, as to the intail, confined to the particular lands allotted to her sister; and consequently neither of the tenants in tail did any act to bar the intail, in her original moiety of the lands, taken by her on the partition: and therefore as to one moiety of the lands in each allotment, there was a subsisting intail.

The plaintiff, it must be remembered, claimed and recovered a moiety of those particular lands, which were surrendered to his mother on the partition, and not a moiety of a moiety, or a fourth part of these lands; and it was a moiety of the intirety of these lands to which he was really intitled; for his mother had a moiety in all the lands, and her surrender barred her intail

in her moiety of those lands only which were comprised in her surrender, leaving her original moiety in the lands allotted to her, altogether unaffected by her surrender.

As to the issue of the other sister, the same observations apply to the lands which she received under the allotment made to her.

In short, after the partition and the surrenders made to give effect to the same, each party had an estate-tail in one moiety, and an estate in fee-simple in the other moiety of the lands comprised in her allotment. That she had an estate in fee in one moiety of these lands was the consequence of her sister's surrender.

That she had only an estate-tail in the other moiety, arose from the want of a surrender by herself of that moiety: so that the estate-tail was in her original moiety of the lands allotted to herself, and her estate in fee was in that moiety which she received under the surrender of her sister as part of the transaction of partition.

The difference between this case and *Church and Edwards*, is, that in *Church and Edwards* the title was complete by means of the learning on merger. The base fee derived from the estate-tail merged in the reversion in fee. At least this must be the result of admitting that the estate-tail and

the reversion in fee of each person, were several estates in the same individual share; and that the fine of one of them gave that person a complete ownership and dominion over the moiety in which she had the reversion in fee. While in the case in *Ambler*, the title was defective for a moiety of the lands in the surrender, because the surrenderor never had any estate-tail in that moiety.

It was intended to have taken a view of the nature of cross remainders, as part of this chapter; but as such a view would have been only a repetition of one of the tracts already published, (*b*) and also of part of the intended additions to the *Essay on the Quantity of Estates*, it is not deemed justifiable to introduce the observations at large, into this volume. Suffice it, therefore, to say, that under cross remainders, each person has a distinct estate, and only one estate, in each distinct part, although there may be one hundred parts and not two estates in any part.

And the reader who wishes to pursue the author's arrangement of the subject of this volume should, at this point, read the tract on cross remainders.

(*b*) See Tracts on Cross Remainders, &c.

CHAP. IX.

First, That the several estates must be immediately expectant on each other.

Secondly, That the more remote estate must be without any intervening vested estate, and also without any intervening contingent remainder created in the same instant of time, and by the same means as gave origin to the other estates. And,

Thirdly, That the determination, or acquisition of an intermediate estate may be the cause of merger, as between estates kept distinct by means of the intermediate estate.

THE two first heads will be blended under one general view of the subject.

From all the cases which have been determined, it may be collected that (with the exceptions which will be noticed,) the two estates must be the two vested estates, which are to take effect immediately after each other, without any intermediate vested estate; or at least, without any intervening remainder in contingency, arising under the same conveyance by which the former of these estates is created.

It is absolutely necessary, that the latter estate should be connected with the former estate, and be immediately expectant thereo, so as to come into its place, on the determination of that estate.

This is universally true of merger, as far as relates to the right of possession, by means of the more remote estate; but in estates of freehold, there will be a species of merger, or rather of union, and consolidation without merger, notwithstanding the interposition of an estate for years, and in some cases, notwithstanding a mesne contingent remainder. This is a consequence of the system of our tenures. The two estates of freehold are united, only for the purpose of remedial actions, and of conferring a title on husbands to be tenants by the curtesy, and of wives to be tenants in dower. As between these persons, and with a view to remedies, by real actions, and rights depending on the ownership of the freehold, a term for years is considered merely as a contract for the possession. At the common law, the tenant under a term for years, was rather a bailiff, than an owner.(a) Originally, he had not any permanent interest. He held rather by curtesy, and favor, than as a rignt; for the

(a) 1 Salk. 254. Essay on Estates, Chap. Freehold.

bnefit of the lessors, rather than for his own particular interest. Till the reign of Henry the eighth, the termor was merely dependant on his lord, for the continuance of his tenancy. By a feigned recovery, the term might have been defeated, and the tenant deprived of his remedy. A statute of that reign, first gave stability to the interest of the termor, by enabling him to falsify recoveries against his lessors, when these recoveries were feigned—in other terms, without real title. Under the provisions of this statute, tenants for years became permanent and substantial owners, and were liberated from the tyranny and caprice of their landlords; but, notwithstanding the change in the circumstances of their tenancy, the antient rules of law were applied to titles, which merely concerned the freehold and inheritance. The sole object of the statute, was to give permanency and security to the interest of the tenant, without making any alteration in the ownership of the freehold, or varying the rules, by which that ownership, or the quality of the interest of the termor was regulated.

As far as the doctrine of merger is concerned, the general rule is, that while any estate is interposed between two estates, in the same person, the intermediate estate (with the exception of the instance of a merger taking place, notwithstanding a

contingent remainder, and in destruction of that remainder, under the restrictions noticed in a future page, and of a term of years between two estates of freehold) will, during its continuance, keep the other estates distinct from each other. This rule may be collected from a great variety of cases. Thus executors had a term of years as such, and there was a mesne estate for years, in another person, (for so the book must be understood,) and the executors purchased the reversion in fee, "the first lease remained "by reason of the mesne remainder."(*b*)

So in *Duncomb and Duncomb*,(*c*) a man was tenant for his life, remainder to a trustee for his life, with remainder to himself in tail: and it was decided, that his wife was not intitled to dower. The ground of this determination was, that the trustee had an actual interposed estate for life, and not merely a possibility; and this mesne estate kept the two estates of the husband distinct; and prevented the attachment of a title of dower.

And in *Bates's* case,(*d*) it was admitted that an interposed estate of freehold, would have prevented the union of the estate for life, with the inheritance of the husband, although an intervening estate for years

(*b*) Bro. Lease 63.
(*c*) 3 Lev. 437.
(*d*) 1 Salk. 254.

did not produce this effect: consequently, two estates of freehold united, notwithstanding an interposed estate for years.

So where A. was lessee for years, with remainder to B. for years, and the term of A. came to the queen, and afterwards the reversion vested in her; *Clark*, Baron, said, that the lease of B. should begin presently, and cited the case of *Wrotesley and Adams*, where a lease for years is made to A. and afterwards, a lease in reversion is made to B. for years, and A. obtains an estate for life from him in the reversion, the estate of B. shall begin presently. But *Manwood*, Chief Baron, held that the first lease was not extinct.(*e*) And he was right, if we suppose the intervening years to have been an actual term, as distinguished from an *interesse termini*.

So, per *Hales*, Just.(*f*) if a man lease to one for ten years, and afterwards lease the same land for twenty years, and the first lessee purchases the reversion in fee, yet the first lease is not extinct, because the second lease, which is for twenty years, is mesne between the first lease, and the fee-simple, which is an impediment to extinguishment. (*g*)

(*e*) 4 Leon. 9. 33 Eliz.

(*f*) Brooke Exting. 54.

(*g*) Also see Whitchurch and Whitchurch, 2 P. Wms. 236. Scott and Fenhoulet, 1 Bro. Ch. Cas. 69.

In this case, some stress seems to have been laid on the circumstance, that the mesne estate was for more years than the preceding estate; but this makes no difference, for though the preceding estate is for more years than the mesne estate, the mesne estate will be an impediment to the merger.(*h*)

Tenant by elegit, takes a confirmation for term of his life. He is in by the tenant of the freehold, and not in the post, by the law, as he was before: in other words, his estate as tenant by elegit is merged: and then if the tenant of the freehold had charged the land, between the execution made by the extent, and the confirmation, the tenant by elegit shall hold charged, where he was discharged before.(*i*)

So if tenant(*k*) by statute merchant, or of the like interest, bring an assize, and pending the writ, the fee-simple *descend* to him, this shall abate the writ, for the descent of the greater estate extinguishes the lesser.(*l*)

Although a contingent remainder depending on the former of two estates vested in the same person, will suspend the absolute and positive union of these estates,

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(*h*) Brooke Exting. 30.

(*i*) 31 Ass. pl. 13.

(*k*) Bro. Extinguishment, 56.

(*l*) 32 H. 6. 30.

if all the estates are taken under one and the same conveyance, or arise under a transaction, which confers a title to all the estates in the same instant of time, and as if it were *uno flatu*. Yet this protection from merger,(m) will continue only till the owner of these estates has done some act, by which he confounds the first of his estates in the more remote estate; and by that means destroys the contingent remainder, by depriving this remainder of its support. Of this subject, with its distinctions, a more detailed view will be given, in considering the effect of merger on contingent remainders.

And even while the intervening remainder is in contingency, the several estates belonging to the same person, will unite for all the purposes of tenure, and there will be a temporary merger, subject to the right of those intitled under the contingent remainder, to have the benefit of that remainder, when it can vest. In this instance, the estate opens and closes as the circumstances of the contingent remainder require.

Thus in *Lewis Bowles's* case,(n) a settlement was made to the use of *Thomas Bowles*, and *Ann* his wife, for the term of their lives,

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(m) Per Hale in Purefoy v. Rogers, 2 Saund. 380.
(n) 11 Rep. 79.

without impeachment of waste, and after their decease to the use of their first son in tail male, with remainders to the other sons successively in tail male, with remainder to the use of the heirs of the body of the same *Thomas* and *Ann*, with divers remainders over.

John, their only son, died without issue, and *Ann* entered, and waste took place. The first question in the case was, if upon the whole matter, the wife should be tenant in tail, after possibility of issue extinct, or that she should have the privilege of a tenant in tail, after possibility, namely, to commit waste.

And as to that point, it was resolved first, that till issue, *Thomas* and *Ann*, were seized of an estate-tail, executed *sub modo*, namely, till the birth of the issue male, and then, by the operation of law, the estates were divided, namely, *Thomas* and *Ann*, became tenants for life, the remainder to the issue in tail, the reversion to the heirs male of *Thomas* and *Ann*, the remainder over as aforesaid, for, it was added, the estate is not absolutely drowned, but with this implied limitation, till they have *issue male*.

And, notwithstanding an intervening estate for years, the freehold may unite with the inheritance, when the freehold and the inheritance meet in the same person, so

as to confer a title by curtesy, dower, *possessio fratris*, &c. without prejudice to the term. Under these circumstances, the estate for years, which is interposed, and the several estates of freehold, will give several, and distinct times of enjoyment; and it is to some purposes only, that the owner of the freehold, is considered to have an actual seisin of the more remote, as well as the more immediate estate.

Bates's case(*o*) is relevant; and will exhibit the distinction in its true point of view. In that case, a person was tenant for his life, with remainder to trustees for a term of years, with remainder in fee, to the tenant for life, and he died; and it was ruled, that his wife should be endowed, notwithstanding the intervening estate: for that being for years, was not to be regarded. It was added, at the common law, the freeholder might destroy it, by a feigned recovery, and as the case was, the party died seized of an estate-tail.

On these cases it may be observed, that the several limitations conferred a title to distinct estates. That these estates were blended, must have been the consequence of union and consolidation. It is clear, that if the freehold had continued distinct

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(*o*) 1 Salk. 254.

from the inheritance, there could not have been any title to curtesy. That title must arise from a seizin of the inheritance: and there must be an actual seizin of the inheritance, and of the immediate freehold, perhaps it may now be said, as a consequence of the ownership of that estate. These cases prove, that there was this seisin of the inheritance by a merger, or at least consolidation of the freehold in the inheritance. However, it is observable, that there are instances of a qualified merger; of a merger, which is complete as between those who shall become intitled to the inheritance. On the one hand, it does not, as is the ordinary effect of merger, accelerate the right of possession under the term of years; and on the other hand, the term of years continues in full force, and precisely in the same condition as if there had not been any merger. This then is an example of merger, as between some persons, and not between all persons; or more accurately speaking, it is an instance of union and consolidation, without producing all the effects of merger.

It must, however, be remembered, that in *Cordal's* case,(*n*) where A. was tenant for life, remainder to his first, and other sons in

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(*n*) Cro. Eliz. 315.

tail, with remainder to A. himself in tail, it was resolved, that the estate-tail of A. was not executed, in other words vested in possession, for the possibility of the mesne estate that might interpose; and therefore it was always disjoined during the life of A. so that the wife of A. could not be endowed.

While in *Hooker v. Hooker*(o) Lord *Hardwicke*, and three of the judges, held, that even supposing after the descent in that case of the fee upon B., there remained any possibility of the estates opening to let in the contingent remainders; yet as the contingency had never happened, and, the husband being dead, never could happen, the wife should be intitled to dower; and Lord *Hardwicke* added, he did not think *Cordal's* case was law, and he said it was denied 2 Sand. 386. and also in another like case by *Bridgman*.(p) But no *dicta*, &c. are found which support the observations of Lord *Hardwicke* in their general and unqualified import.

So(q) when lessee for life, leased to his lessor, for the life of the lessor, he retained a reversion or mesne estate, and no surrender, or which for this purpose is the same

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(o) Cas. T. Hardw. p. 13.

(p) Perhaps Stephens v. Bretridge, 1 Lev. 36.

(q) 2 Roll's Abr. 496. pl. 7.

thing, no merger took place; for in the language of *Rolle* the lessee had a possibility (an inaccurate phrase) to have the land again, namely, if the original lessor should die in his life-time.

Again, if a lessee grant part of his estate to the lessor, by which a reversion continues in him, this is not any surrender or merger (*r*)

As if lessee for twenty years, grant all his estate to the lessor, except a month, or day, *at the end* of the term, this is not any surrender, because the original lessee has a reversion.(*s*)

In this place, there may again be introduced the instances put in these terms. If lessee for life, lease to the lessor in reversion, and the heirs of his body, for the life of the original lessee;(*t*) this is not any surrender, for there may be an heir of the body, who may not be the heir general, and the estates may be divided. To be more apposite, the estate may determine by the failure of heirs of the body, and the duration of the estate is measured by the continuance of these heirs.

Also in Alderman *Garraway's* case,(*u*) a

(*r*) 2 Roll. Abr. 497. pl. 13.

(*s*) Bacon v. Waller, 2 Roll. Abr. 497. pl. 14.

(*t*) 2 Roll. Abr. 497. pl. 16.

(*u*) Cited in Hard. 417.

lease for one hundred years being made, the reversion was granted for life, and the lessee [for years] granted his estate to him in the reversion in fee, and it was held that "the lease for years was not destroyed by "meeting with the fee, because by possi-"bility the lease for life might outlast the "term."

So in *Stephens v. Bretridge*,(x) the husband was tenant for his life, remainder to his wife for her life, remainder to the husband in tail: and it was held that "the estate of the "wife was a mesne remainder between the "estate for life, and the estate-tail of the "husband; and it cannot be intended that "when an estate for life is limited to the "wife, that this should instantly merge in "the estate of the husband."

And a long list of cases to the same point, might, if it were necessary or convenient, which it is not, be introduced to establish the general proposition, that a mesne estate will protect against merger.

But in Bro. Surrender, pl. 17, this case is stated: *Formedon* against tenant for the term of his life, the remainder to W. for the term of his life, and the first tenant for life, grants or leases his estate to him in remainder, for the term of his life, to hold to him in remainder for the life of himself,

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(x) 1 Lev. 36.

the grantee. Per *Wilby*, Just. "clearly this is "no more than a surrender."

This conclusion may however be doubted, since all the estate was not granted, but a reversion remained in the grantor. And therefore, in *Perkins*(y) it is assumed, that if lessee for life, of land, lease the same land unto him in the reversion for life, [read the life of him in reversion,] the remainder unto a stranger in fee, the same is no surrender. *Causa patet*.

And in *Bro. Abrid.*(z) there is this further point, a man leased land for term of life, the remainder to W. in tail; the tenant for life leased to him who had the remainder for the term of the life of him in remainder, who took a wife and died, and the first lessee entered, and the *feme* was barred of dower, and so this was no surrender.

An *interesse termini* will not prevent a merger of two estates, expectant on each other, though it be interposed between them.

For an *interesse termini*,(a) is no such intervening interest, as will prevent the application of the law on merger. On the contrary, notwithstanding an *interesse termini*, two estates which in all other respects are

(y) § 621.
(z) Surr. pl. 49.
(a) Symonds v. Cudmore, 4 Mod. 1.

immediate to each other will unite, and the right of possession under the *interesse termini* may, unless circumstances impede, be accelerated.(*b*)

Thus A.(*c*) made a lease to B. for ten years, to begin presently, and afterwards A. granted a second lease to C. by deed, of the same land for ten years, to commence at Michaelmas next. B. the first lessee [read before Michaelmas] purchases the fee, so that the term is drowned. C. the second lessee, may enter at Michaelmas, and enjoy the term, &c. by the opinion of all the court of C. B. except *Brown* J.

An *interesse termini* is assignable; and the case of *Salmon v. Swan*, noticed in a subsequent page, proves that a prior estate for years, will not prevent an extinguishment, by way of release, in the reversion, though the release cannot operate by way of merger. So that an *actual* term is no impediment to the extinguishment of an *interesse termini*, although this actual term would prevent the merger of the prior interest if it were an actual estate. To be supported, *Salmon v. Swan* must be referred to the same principle as enables a remainder-man or reversioner to accept a release for the benefit of the tenant of a particular

(*b*) Hetley, 55. Northam's case.

(*c*) Dyer, 112.

estate as well as of himself, from a person who has merely a right or title.

An *interesse termini* is not a vested interest. It is of a peculiar nature. Till it becomes an actual term, it rests merely in contract. It gives no actual vested estate. There is not any term, but merely a contract to have a term: in other words, the interest of a term. On this account it is not, in any case, an impediment to merger. Notwithstanding this interest of a term while it continues *in fieri*, there may be an actual, absolute, and complete merger, as well of subsisting terms for years, as of estates of freehold interest.

Nor is an *interesse termini* subject to the laws of surrenders. By union of the estate, and of the *interesse termini* there may be an extinguishment, though there cannot be merger, properly so called, or the corresponding effect of surrender.

In *Salmon v. Swan* (a) the king being seised in fee of a farm, &c. let to the Earl of *Northumberland* and others for one hundred years, if *Frances* Countess of *Kildare*, should so long live, to begin after the death of *Henry* Lord *Cobham* her husband; and afterwards in the same year, granted the land in fee to *Charles Brook*, who leased to *Page* for twenty-one years.

(a) Cro. Jac.

Afterwards the Earl of *Northumberland* and others, the lessees for one hundred years, granted that term to the said *Charles Brook*, who afterwards granted a rent to Sir *Thomas Trevor*, and others, during the life of the said *Frances*.

Afterwards Lord *Cobham* died, and the defendant, as servant to the grantees of the rent, distrained on *Page*, the lessee, for this rent, and whether this distress was lawful or not, was the question?

And this rested upon the lease for one hundred years, whether it were in *esse* in *Charles Brook*, who had the inheritance, and granted that rent, or were drowned in the inheritance. For if it were not drowned then it should avoid (read have preference over) the lease for twenty-one years, which was before this rent-charge granted: and this term being in the grantee who granted it (the rent), was liable to the payment of the rent.

And it was resolved that it was drowned in the inheritance, for notwithstanding this lease for twenty-one years, it (the hundred years) is not so severed from the reversion; but by the grant thereof, to him who hath the inheritance, the future term is drowned, and never shall rise again, and by consequence this rent shall not charge the possession of the termor, who had the estate before the rent granted, and comes

paramount to it.—Wherefore it was adjudged for the defendant.

Although in the report, the language is applicable to merger, it must be read as referable only to extinguishment, or drowning, in that sense.

So by the descent or accession of the freehold to a person who has an *interesse termini*, there will be an extinguishment of the interest under the term.

Thus in *Coleburn and Mixtone's* case, (*b*) *Coleburn* was sued in the spiritual court, for that being executor to one *Alice Leigh*, he had not brought in a true inventory of all the goods of the said *Alice*, but had omitted and left out a lease of two houses, and this suit was at the instance of two daughters of the testator. *Colburn* sued for a prohibition, and surmised and declared, how this lease was extinct; and the matter was this, *H. Leigh* was seised of a house called the *Marygold*, and two other houses in London, and leased the said two houses to one *Alice Cheap* for twenty-one years if she should so long live, and afterwards made a lease in reversion of the said two houses to the said *Alice Leigh* for twenty-one years, and afterwards he devised these two houses and also the house called the *Marygold*, to the said *Alice Leigh* for her life, to bring up his chil-

(*b*) 1 Leon. 129.

dren, and died. After whose death the said *Alice Leigh* entered into the said house called the *Marygold*, and took the rents and profits of the said two houses for the space of seven years, *virtute testament. prædict.* upon which declaration the defendants demurred in law. And by Mr. *Justice Tanfield*, "Presently by the devise, the estate for life was in the devisee, and the term extinct by it; and that was sufficient for the plaintiff: and if there was any disagreement the same was to be shewn on the other side: But if *Alice* had not notice of the devise, but died before notice, the same amounted to a disagreement: and as to the pleading of the agreement, he conceived it was well enough pleaded, for if the lease had not been, she might have entered, and then if such entry had been pleaded, it had been good enough, and then because she could not enter, by reason of the said lease, and she had taken the rents and profits which was an actual agreement, and as strong as an entry."

Also we have shewed that she had entered into the house called the *Marygold*, of which the devisor died seised in possession, and that is a sufficient agreement for the whole, for it is an entire legacy as 18 E. 3. variance 63. If the reversion of three acres be granted, and the tenant for life attorneth for one acre, it is a good attornment for the whole, for he cannot apportion his assent;

and 2 E. 4. 13. If the executor deliver unto the devisee goods to him devised, to re-deliver them to him again at such a day, this is a good assent and execution of the devise, and the words of the re-delivery are void; and by *Gawdy*, "The devise did not vest "the estate in the wife, until agreement. "When a man takes in a second degree, as "in a remainder, the same vests presently "before agreement, but when he taketh "immediately, it is otherwise;" and he held the agreement was well enough pleaded: and by *Wray*, "Presently upon the death of "the testator, the freehold vested in the "devisee, and it was an agreement, *ut supra*, "by taking of the rents; yet the entry into "the *Marygold* was a consent and an exe-"cution of the whole legacy," and as to the rest he agreed with *Gawdy*.

Clench observed "that the freehold "vested presently in *Alice Leigh*, before "agreement, also the entry into the *Mary-*"*gold* was an execution of the whole lega-"cy to the devisee, for her entry shall be "adjudged most beneficial for her, and "that is for all the three houses."

And as a consequence of the merger, the *interesse termini*, may, if the mode of its limitation admits, become an actual term, and the right of possession may be accelerated by reason of the merger of a prior subsisting term of years or of freehold: as when the

interesse termini is limited by way of reversionary lease, to commence from and after the expiration or other sooner determination of the prior estate. This conclusion may be inferred from the principles which governed the court in *Salmon v. Swan*, already cited, and collected from various authorities to be found in the books, although these authorities have not presented themselves for immediate notice.

It is clear that an intervening estate for years will prevent the merger of another estate for years, in the freehold or inheritance, limited to take place after the several estates for years. Thus in *Bicknal v. Tucker*, (c) it was said a lease for years, remainder for years, if the first man taketh for life, the first estate is not so determined, but the remainder standeth.

And it is material to observe in this place, that an intervening estate may arise in various modes.

First, by the limitation of an intermediate estate, by way of remainder; or,

Secondly, by creating a particular estate out of a subsisting remainder, or out of the reversion; and as to this remainder or reversion, and any prior subsisting estate, the estate newly created, will be an intervening

(c) 15 Vin. 362. pl. 2. Brownl. 181.

estate, which will prevent the application of the learning of merger.

And, Thirdly, there may be an intervening estate, by means of a lease, from the owner of a particular estate, to the person next in remainder or reversion, as in some of the instances already noticed: and this intervening estate will in fact be the original particular estate, and prevent the merger of the estate *newly created* in the estate, under the original remainder or reversion.

Some of the instances, it will be observed, are of particular estates, carved out of a remote remainder or reversion, and by creating an intermediate estate, the parties raised a barrier to the merger of a prior particular estate in that remainder or reversion. By the creation of this particular estate, the degree of privity was altered. The immediate tenancy subsisted between the grantee of the remainder or reversion, and the owner of the prior particular estate. During the continuance of this new estate, the grantee was substituted in the place of his grantor; and the right of the grantor to take a surrender, in fact or in law, was suspended at least, as against the grantee.

The case, however, is different when the owner of the more immediate estate, makes a lease. Notwithstanding this lease, the privity continues between the particular tenant thus leasing, and those in remainder or reversion. The lease has merely the effect

of raising a new connexion, between the original lessee and his under-tenant, without destroying the connexion between the original lessee and his lessor.

And therefore if A. tenant for life, (*d*) with remainder or reversion to C. lease to B. for years, or during the joint-lives of A. and B. A. may afterwards surrender his estate to C. who has the remainder or reversion ; or if the estate of A. and C. unite, the estate of A. will merge in the estate of C. In this case, the estate of A. is immediate to that of C. and also to that of B. ; so that A. may accept a surrender from B. or may surrender to C. But while the estate of A. continues, it is a mesne estate as between B. and C. and B. cannot surrender to C. nor can the estate of B. be merged in the estate of C.

But when the estate of the original lessee is surrendered, the relation between him and his under-tenant ceases: and as the connexion and privity was between the under-tenant and his lessor only, and not between the under-tenant and the original lessor, the under-tenant is, by the rules of law, discharged from all the burthen (as rents and covenants) annexed to his tenancy ; (*e*) and it is not

(*d*) Essay on Est. Introductory Chap.

(*e*) Webb and Russell, 3 Term Rep. 401.

clear that a merger does not induce all the same consequences. Such extinguishment clearly is the result, when the estate of the original lessee is granted to the owner of the remainder or reversion: so that the grant does, in law, amount to a surrender in fact; and there are not any authorities, nor is there any principle, from which a difference can be collected to distinguish those cases in which the term of the original lease is merged by the accession, or purchase, of the remainder or reversion.

Thus in *Lord T. v. Barton*,(*f*) a man made a lease for one hundred years, and lessee made a lease for twenty years, rendering rent with clause of re-entry; afterwards the first lessee granted the reversion in fee, and attornment was had accordingly. The grantee purchased the reversion of the term. He shall not have the rent nor the re-entry: for the reversion of the term to which it was incident is extinct, in the reversion in fee: and this was adjudged at the assizes between *Lord T. v. Barton*, as *Stephens* cited it, and *Plowden* and others agreed to it; but *Popham* made this distinction. "If a man make "a lease for life rendering rent, and lessee "for life make a lease for years, rendering "rent, and afterwards lessee for life sur-"render to him in reversion in fee, he

(*f*) Moor, 94.

" shall not have rent of lessee for years, " nor action of waste; because tenant for " life who surrenders could not punish " the waste in this case. So if tenant " purchase the reversion in fee, he shall " not have action of waste during his own " life, but otherwise, if a man make a " lease for years, rendering rent, and after- " wards grant the reversion for life, or for " years, and he in reversion surrender to " him, he shall have rent or waste, because " there was at one time, a rent incident " to the reversion, and not so in the " other case." But *Plowden*, and *Ipesley*, said it was all one, as to the action of waste: *Popham*, however, and it is a rare instance for him, seems to have been correct; for the surrender of the estate for life removed the causes which impeded the right of the original lessor to the action of waste rent, &c. existing prior to the creation of the estate for life.

And in *Webb v. Russel* (a) the declaration stated an indenture of the 26th October, 1780, by which *William Stokes*, and also *Richard Webb*, who was described to be the mortgagee of the premises in question, demised them to the defendant for eleven years from the 29th September, then last, at the yearly rent of two hundred

(a) 3 Term Rep. 401.

pounds, payable to *Stokes* or his assigns; and in that indenture were contained covenants on the part of the defendant with *Stokes* and his assigns, (*inter alia*) to pay the rent, and to keep the premises in repair. It then stated that *Richard Webb*, at the time of the lease was possessed of the premises for the residue then to come and unexpired of a term of ninety-nine years, commencing on the 24th of June 1770, subject to an equity of redemption by *Stokes* on payment of a certain sum with interest to *Richard Webb*; and that the defendant entered on the 26th October 1780, and became possessed for the term of eleven years, the reversion thereof for the term of ninety-nine years belonging to *Richard Webb*, subject to such equity of redemption, and the further reversion in fee belonging to one *G. Medley*. It then stated that by indentures of lease and release of the 23d and 24th March 1781, *Medley* granted the reversion in fee expectant on the determination of the term for ninety-nine years, to *Stokes* and *Morgan Thomas*; who, by indentures of lease and release, dated 26th and 27th March, 1781, and made between *Stokes* and *Thomas*, of the first part, *Robert Webb*, of the second part, and *Makepeace Thackeray*, of the third part, granted it to *Thackeray*, his heirs and assigns, in trust for

Robert Webb, his heirs and assigns, subject to a proviso for redemption on payment of a certain sum and interest by *Stokes* to *Robert Webb*, on a day therein mentioned and since past. That on the 30 th May 1785, *Robert Webb* died, having first made his will, by which he bequeathed to the plaintiff all his worldly estate, and appointed her sole executrix; that she proved the will, took upon herself the burthen of the execution of it, assented to the said bequest, and claimed to have the reversion of the premises for the residue of the term of ninety-nine years, (subject to *Stokes's* equity of redemption) and the money thereupon secured to *Robert Webb*, as legatee; and by virtue of that bequest, assent, and claim, she became possessed of the said reversion for the residue of the term of ninety-nine years, subject, &c. and that by indentures of lease and release, dated 12th and 13th February 1787, and made between *Thackeray*, of the first part, *Stokes*, of the second part, and the plaintiff of the third part; *Thackeray* and *Stokes* granted and released to the plaintiff the reversion of the premises in fee, freed and discharged from all right and equity of redemption whatsoever; by virtue whereof she became and was and still is seised in fee of the reversion of the premises, immediately expectant on the determination

of the term of eleven years. The declaration concluded with setting forth two breaches of covenant; the one for non-payment of one year and one quarter's rent, due at Lady Day, 1788; and the other for not keeping the premises in repair.

To this there was a general demurrer, and joinder; and Lord *Kenyon*, Ch. J. delivered the opinion of the judges then in court, as to the material point now under discussion, in these terms.

"It is extremely well settled at common "law, without referring to the statute 32 "*H.* 8. *Ch.* 34. that covenants which run "with the land, will pass to the person "to whom the lands descends. And that "statute enacted, for the benefit of the "grantees of reversions, that they should "have the like advantages against the "lessees, their executors, &c. by entry "for non-payment of the rent; and should "have and enjoy all and every such ad-"vantages, benefits, and remedies, by ac-"tion only, for not performing other con-"ditions, covenants, or agreements, con-"tained in the leases against the lessees, "as the lessors or grantors had. The "statute also contains a clause, giving the "lessees the same remedy against the "grantees of the reversion, which they "might have had against their grantors. "Therefore under this statute the grantees

"or assignees stand in the same situation,
"and have the same remedy against their
"lessees, as the heirs at law of individuals,
"or the successors in the case of cor-
"porations, had before the statute. It
"becomes therefore necessary to inquire
"whether this action of covenant could
"have been maintained by the heirs of
"the person from whom the plaintiff
"derives her title. I have already ob-
"served, upon the introduction of one
"fact into this case which might have
"been omitted; there is also another,
"which deserves some observation here.
"It is stated that *Stokes* was only a
"mortgagor, who had parted with his
"whole term to the mortgagee; and the
"declaration goes on to state that the
"whole interest which was vested in
"him he had transferred to the mort-
"gagee. Therefore, in point of law, I
"cannot conceive how this covenant made
"with *Stokes*, can be said to run with
"the land; for *Stokes* is stated in the
"declaration to have no interest whatever
"in the land, and yet both the implied
"covenant, arising from the 'yielding and
"paying,' and also the express covenants
"are entered into with *Stokes*. It is
"not sufficient that a covenant is *con-*
"*cerning the land*, but, in order to make
"it run *with the land*, there must be a

" privity of estate between the covenant-
" ing parties. But here *Stokes* had no
" interest in the land, of which a court
" of law could take notice, though he
" had an equity of redemption, an interest
" which a court of equity would take
" notice of. These therefore were col-
" lateral covenants. And though a party
" may covenant with a *stranger*, to pay
" a certain rent, in consideration of a
" benefit to be derived under a third
" person, yet such a covenant cannot run
" with the land.

" But even supposing that these co-
" venants had been entered into (not with
" *Stokes*, but) with *Webb*, who had an
" interest in the land, the subsequent
" transaction, which is stated in the
" declaration, puts an end to this question.
" It appears that the person intitled to
" the reversion of the ninety-nine years
" term, expectant on the determination
" of the eleven years term, created by
" the lease, afterwards acquired in her
" own person, the absolute inheritance
" of the land; in consequence of which
" the reversion attendant on the lease
" granted to the tenant, no longer exist-
" ed. Another estate, totally different,
" arose by the extinguishment of the
" intervening estate. Many cases were cited
" on this subject; one of which, *Moor*,

" 94. is very applicable. There a person
" made a lease for one hundred years,
" and the lessee made an under-lease
" for twenty years, rendering rent, with
" a clause of re-entry ; afterwards the ori-
ginal lessor granted the reversion in fee,
and the grantee purchased the reversion
" of the term; and it was held that the
" grantee should not have either the
" rent, or the power of re-entry; for the
" reversion of the term, to which they
" were incident, was extinguished in the
" reversion in fee. And though this case
" was only determined at the assizes, yet
" it was afterwards recognized in the court.

" Considering then that these are
" covenants entered into with a stranger,
" that do not run with the land; con-
" sidering also that the rent is incident
" to the reversion, out of which the term
" is carved, and that that reversion is gone,
" it seems to me, with all the inclination
" which we have to support the action,
" (and we have hitherto delayed giving
" judgment, in the hopes of being able
" to find some ground on which the
" plaintiff's demand might be sustained,)
" that it cannot be supported. The defence
" which is made is of a most unrighteous
" and unconscientious nature: but unfor-
" tunately for the plaintiff, the mode
" which she has taken to enforce her

" demand cannot be supported; and con-
" sequently there must be judgment for
" the defendant."

From these authorities it is evident that notwithstanding a merger or surrender, the under-lease would continue, and the lessee would be discharged from the payment of rent, and from all conditions and dependant covenants annexed to his lease. This effect of surrender was a serious mischief, and to remedy it, as applicable to certain cases, it is enacted by the statute of 4 *Geo.* 2. *c.* 28. *s.* 6. which is not an act of general remedy, " That
" in case any lease shall be duly sur-
" rendered in order to be renewed, and
" a *new lease made* and executed by the
" chief landlord or landlords, the same
" new lease shall, without a surrender
" of all or any the under-leases, be as
" good and valid to all intents and purposes
" as if all the under-leases derived thereout
" had been likewise surrendered, at or
" before the taking of such new lease.
" And that all and every person and
" persons, in whom any estate for life
" or lives, or for years, shall from time
" to time be vested by virtue of such
" new lease, and his, her, and their ex-
" ecutors and administrators, shall be in-
" titled to the rent, covenants and duties,
" and have like remedy for recovery

"thereof, and the under-lessees shall "hold and enjoy the messuages, lands "and tenements in their respective under-"leases comprised, as if the original "leases out of which the respective under-"leases are derived, had been still kept "on foot and continued, and the chief "landlord and landlords, shall have and "be intitled to such and the same remedy "by distress and entry, in and upon the "messuages, lands, tenements, and here-"ditaments, comprised in any such under-"lease for the rents and duties reserved "by such new lease, so far as the same "exceed not the rents reserved in the "lease out of which such under-lease was "derived, as they would have had, in case "such former lease had still been con-"tinued, or as they would have had in "case the respective under-lease, had been "renewed under such new principal lease; "any law, custom, or usage, to the con-"trary thereof notwithstanding."

There is a similar provision in the statute of 39 and 40 *Geo.* 3. *c.* 41. which enables bishops, &c. to renew leases by sub-dividing tenements, and apportioning the rents, &c.

The statute of 4 *Geo.* 2. does not operate to confirm leases. Its effect is merely to authorise surrenders, with a reservation of the privity and relation of landlord and

tenant, between the original lessee and his under-lessees; when the original lessee takes a new lease; and to give to the original lessees the same remedies, against their tenants, as they might have pursued prior to the surrender. The scope of the statute is to place the original lessees, and the ground landlord, exactly in the same situation, as if no surrender had been made, and now the ground landlord may distrain on the land for the reserved rent; and the original lessee may recover the rents reserved to himself, and enforce the covenants entered into by the under-lessee. But the statute has no words by which under-leases derive any additional effect from a renewal. If void before the surrender, they continue void afterwards, and are not established by the renewal. These leases continue to be precisely in the same state as if no new lease were obtained.

Under this division it may also be observed as in some degree connected with this learning, that the remedy of the original lessor by *distress*, arises merely from the positive rules of law, and not on the ground of contract between the lessor and the under-lessee; for the under-lessee is not personally chargeable, even as occupier, and for that reason an action of debt or of covenant cannot be maintained against him by the original lessor. Between them there is not any

privity. That the goods and chattels of the under-lessee may be taken in distress, (a) is merely the consequence of a right conferred by law on the original lessor to distrain all goods and chattels which he finds on the land, except those goods and chattels which are, for particular reasons, privileged from distress.

The merger of one of three or more estates, may be interrupted by reason of a mesne estate, which cannot merge, because it is larger than the more remote estate.

From the general tendency of the observations which have been already submitted to the reader, it will be obvious, that if any one of the mesne estates is greater in its quantity and extent, than the estate by which it is followed, the operation of the doctrine must experience an interruption at this point: under these circumstances the doctrine must be stationary till the impediment shall be removed, either by the actual determination of this mesne estate, or by some change in the tenancy of the parties, which will afford room for the application of the learning; and this may happen by the accession of those interests which will merge

(a) Holdford v. Hatch, 3 Doug. 183. Brewer v. Hill, 2 Anstr. 413.

the more remote estate, and bring the mesne estate within its vortex, and put an end to the previous impediment to a merger of the prior estate by annihilating the intermediate estate.

These observations are relevant to a case of this description. A. is tenant for twenty-one years, remainder to B. for life, remainder to A. for life, remainder to A. for one thousand years, remainder to D. in fee, and B. conveys his estate to A. As soon as this conveyance is made, first, the estate for the life of B. and secondly, the estate for twenty-one years, will merge in the life-estate of A. This is the *ne plus ultra*, to which the doctrine can be carried under these circumstances of the tenancy. The next estate of A. is for years, and his estate for life is larger than, and prior to that estate, and for that reason cannot merge in the same; but suppose D. who is seised of the fee, to convey that estate to A. or to limit the same to him in tail, or to die leaving A. his heir; in either of these cases, the accession of the fee, will operate to the merger and annihilation of the estate for one thousand years. By these means the estate of A. for his life, and his estate in fee, or in tail, will become immediate to each other; and as the estate for life, or for years, is less than the estate-tail, or in fee, the estate for life will merge in that estate.

The purchase, or determination of an intermediate estate, may be the cause of merger, as between two estates, kept distinct by means of the intermediate estate.

As soon as the intermediate estates determine by effluxion of time, or by merger, or surrender, &c. then the estates between which they were interposed will unite. The determination of the mesne estate removes the impediment, and gives scope to the doctrine of merger, so that the purchase or accession of an intermediate estate, may afford scope for the application of this doctrine, as between other estates divided by this mesne estate. Each estate may merge in the estate next in order of time, and by progression, all the estates may ultimately be absorbed in the more remote estate, as often as this more remote estate is as large as, or larger than, any of the preceding estates, and there is such a gradation between the several estates, so that the several estates may successively merge in each other, either in progressive or some other order. To illustrate these observations by an example,—when A. is tenant for years, or for life, remainder to B. for years, or for life, remainder or reversion to A. in tail or in fee, and B. conveys his estate to A.—in each of these instances

all the other estates will concede to the fee, and form one single intire and consolidated interest. In a case so circumstanced, the operation of this doctrine is gradual. At first it applies to the estate of B. and merges that estate in the fee. By this operation the several estates of A. become immediate to each other, and then the subsequent estate acquires such a quality, that the more immediate estate may merge in this estate, as an estate immediately expectant thereupon.

The case of *Holt and Sambach*(a) involved these considerations. In that case Sir *William Catesby* was tenant for life of the manor of *Lopworth*, remainder to *Robert* his son and heir apparent, and to the heirs male of his body, remainder to Sir *W. Catesby* and to the heirs male of his body, remainder to the heirs of the body of the said *Robert*, remainder to the right heirs of the said Sir *W. Catesby*; Sir *W. Catesby* and *Robert*, being within age, joined in a deed whereby the said Sir *W. Catesby* granted, and the said *Robert* confirmed to the avowant and his heirs an annual rent of ten pounds by the year, payable out of the said manor of *Lopworth*, to the said defendant and his heirs, at two feasts, viz. at the Annunciation

(a) Cro. Car. 103. Hetley, 74. Hutt. 96.

and St. *Michael*, with clause of distress, and *nomine pœnæ* of twenty shillings for every month. Afterwards Sir *W. Catesby* and *Robert* joined in a fine of the said manor to the use of the said *William* and his heirs, who enfeoffed the plaintiff and died. *Robert* had issue then living. The defendant avowed for twenty shillings, parcel of five pounds due at Michaelmas, in the second of *James*, and because two hundred pounds were due *nomine pœnæ* for two hundred months, he avowed for fifty pounds of this *nomine pœnæ*. The defendant set forth all this matter by way of avowry except the nonage, and feoffment to the plaintiff; and the plaintiff in bar of the avowry shewed the nonage of him who confirmed, and pleaded the feoffment and averment of the life of the issue in tail. On this bar to the avowry, it was demurred and argued at the bar: and the sole question was, whether this debt be chargeable on the feoffee? because the rent was granted by tenant for life and confirmed by him in the remainder in tail, being within age at the time of the grant; for it was agreed if a rent be granted by tenant for life and confirmed by him in remainder in tail within age, that it is issuing out of the estate for life only, and merely a void grant as to the remainder; and if the tenant for life purchase the remainder or reversion, and dies, it shall

not bind the inheritance; and although he, the tenant for life, had made a feoffment over, his feoffee, after his death, should avoid it; but here because he that made the grant, was not only tenant for life, but had a remainder in tail, and after that a remainder in fee, the rent was issuing out of all his estates: and although it was void as against *Robert*, the son, who was next in remainder in tail, who confirmed it, yet for as much as this estate-tail was barred by the fine, and the limitation thereof was to the use of him and his heirs, who granted the rent, and the plaintiff being in, as feoffee to him, the court inclined in opinion for the avowant's right to the rent; for the estate-tail being barred, that privilege shall not extend to the feoffee, for he comes in under all the estates of the feoffor who granted the rent-charge, and therefore shall hold it charged; but because the avowry was for twenty shillings, parcel of five pound, and the fifty pounds was parcel of the two hundred pounds penalty, and he did not shew that the residue of the penalty was discharged; therefore it was held that the avowry was ill according to 20 *Edw.* 4. *fo.* 2, and 48 *Edw.* 3. *fo.* 3. And so without regard to the matter in law, it was adjudged for the plaintiff upon the insufficiency of the avowry.

This case, as to the principal point, and as far as it is any authority, assumes that the times of the several estates for life, and in tail merged in the ultimate reversion in fee. The order of the merger must have been progressive. First, the time of the estate in tail general of *Robert;* secondly, the time of the estate, in tail male of *Sir William;* thirdly, the time of the estate in tail male of *Robert,* and ultimately the time of the estate for life of *Robert,* must have severally merged in the remainder or reversion in fee. As long as the several estates were in the tenancy of distinct persons, they were kept apart by the intermediate estates. But as soon as the several estates were vested in *Sir William* himself, they became subject to the rule of law, for the merger of the particular preceding estate.

From the same case we may extract the proposition, that when tenant for life with remainder in tail male to his infant son, with remainder to himself in tail male, with remainder to his son in tail general, with remainder to himself in fee, grants a rent-charge in fee, and afterwards the father and son join in a fine to the use of the father having the fee, and the father conveys by feoffment to a purchaser, all the particular estates are merged, and the ultimate fee is accelerated,

and the possession is chargeable with the rent.

It is on this ground, and this ground alone, that the feoffee could at that particular period have been charged with the rent: he was liable only in respect of the estates and ownership of the father, not of the estates or ownership of the son, since the son was an infant when he confirmed the grant, and unless the time of the son's estate-tail was annihilated by merger in the estate of the father, the possession was held in right of the son's estate-tail and not of the estate of the father. It follows that, in the supposition that the son's estate-tail conferred a title to a continuing estate, the feoffee or terre-tenant was not chargeable with the rent. In short, the right to charge the terre-tenant with the rent in respect of his possession, depended wholly on the point that the time of the son's estate-tail was merged in the time of his father's ultimate reversion in fee.

It is also observable in this case that the father and son levied a fine to the use of the father in fee; and that under the declaration of the uses of that fine, the times of all the several estates were centered in the person and tenancy of the father. Of his reversion in fee, and the time of his estate-tail, he was

seised by resulting use, as part of his former ownership, and he became the owner of the several estates of his son by the declaration of the uses of the fine. He therefore took the estates of his son under circumstances, which allowed of their merger. Though the use of the time of all the estates which passed by the fine, was limited to him, by one undivided clause, yet, in effect and construction of law, he became seised of the time of the several estates of himself and of his son; partly by the declaration of uses by his son, and partly under his former ownership; and not in point of law under the ownership of the conusee in the fine. The temporary union of these estates in the conusee, by means of the fine, did not give them any protection from merger; because the instantaneous seisin of the conusee, was immediately severed by the operation of the statute of uses.

The parties derived their ownership under that statute; and as the statute left to the estates the qualities of the former ownership, it left to them the quality of merger, notwithstanding the uses were to arise from the seisin transferred to the conusee, by a joint conveyance. To this purpose, the conusee is a mere conduit-pipe, and the uses arise on the old seisin

of the former owners, rather than the seisin which they transfer to the conusee.

These observations are necessary for the purpose of marking the material points of this case, because they are the only means of distinguishing this determination from those determinations in which the tenants of several distinct estates have joined in conveying these estates to a third person, for the benefit of that person, and he has been considered as holding under the ownership of each person during the time or period of his estate.

The illustration now given of the doctrine of merger, shews its application to any number of estates. Either each successive estate may be gradually raised in quantity and extent of ownership above the estate next in order of time;—or the first or any intermediate estate, may be larger than a more remote estate, and still it will merge, so as the owner of that estate has a more remote interest of larger extent, capable of absorbing the first or any intermediate estate when it becomes in immediate connexion with his estate.

For the operation of the doctrine of merger, as between three or more estates commences with the estate most immediate to the ultimate or remote interest, which

is to be the cause of the merger, and then with the next immediate estate, and so in a retrograde order, precisely in the same manner as if the interme diate estate never had beenlimited. In point of law the more remote estates are absorbed by the doctrine of merger, and effectually determined before the more immediate estates are brought within the influence and application of this learning. The same rule prevails, when there is a mesne estate, larger than the first estate, and also larger than a more remote one, while that, in its turn, is less than the first estate, and the ultimate estate is larger than any of them. The interposed estate will merge in the ultimate estate, and then the prior estate may also merge in that same estate in which the intermediate estates have been annihilated.

CHAP. X.

One of two Estates, will merge in the other, as often as that Estate, if in the Tenancy of a distinct Person, might have been surrendered to the Tenant of the other Estate.

As a general proposition, merger will take place in all those instances in which two estates meet in the same person, and the owner of one of these estates might surrender to the other, if the two estates were in the tenancy of distinct persons. The instance of two estates of freehold with an intervening estate for years, is perhaps an exception. It seems the existence of this mesne estate will be an impediment to the effect of a surrender, but it will not altogether prevent the application of merger. The merger, however, will not accelerate the right of possession under the term if it be a vested term.

This is evident from the case of *Bate*, already cited.

Of the general Analogy between the Law on Merger, and Surrenders.

That the doctrine of merger should bear a very near analogy to, and intimate connexion with the doctrine of surrenders; and that merger and surrender, should correspond in their effects, and in the consequences they induce, is perfectly reasonable, and consistent with the principles of our system of law.—The general, at least correct rule, in pleading, is, that *every deed must be pleaded according to its effect*, and not according to the form or mode of conveyance in which it is prepared, unless it may operate in that mode, and the party elects to claim under the same as operating in the form which it assumes. In some cases, however, the party is not even left to his election, to fix on the mode in which the deed shall operate; but he must plead the deed according to the effect ascribed to it by the rules of law: and therefore, when a tenant for life grants all his estate to the person who has the immediate reversion, and that person has an estate rendering him competent to accept a surrender, the law, except in some particular cases which will be

noticed, treats this instrument being in the form of a grant, as a surrender; and it must be pleaded as a surrender and not as a grant. So a grant by a reversioner or remainder-man to a tenant, for years, or for life, must be pleaded as a release or confirmation in enlargement of an estate, if this be its effect.(*b*)

With these exceptions, the person who claims under a deed, has the privilege of making the same available in any mode he pleases, so as the requisite circumstances concur. He is not bound to plead the deed according to the formal words used in the conveyance to him. This is a relaxation of the old law of tenures, in support of the intention.(*c*)

And the practice of the court is founded on the rule of exposition, *quum quod ago, nōn valet ut ago, valeat quantum valere potest:* or as the rule is differently expressed, the construction must be such that the whole deed, and every part of it may take effect; and as much effect as may be to that purpose for which it is made, so as when the deed cannot take effect according to the letter, it be construed so as it may take some effect or other: "*verba debent intel-*

(*b*) See Chap. Releases in the second volume.

(*c*) See Com. Dig. Covt. G. 2. 1 Inst. 49. Willes' Rep. 686.

ligi cum effectu et benigne faciendæ sunt interpretationes, ut res magis valeat quam pereat."(*d*)

And the cases of *Roe v. Tranmer, and others,* and (*e*) *Shove v. Pincke* (*f*) afford the best practical illustration of the rule. In *Roe v. Tranmer and others,* (*g*) a conveyance was made by indentures of lease and release in favor of a brother and nephew of the grantor, from and after *the death* of the grantor.

This conveyance was void under the rules of the common law, and consequently as a lease and release, because it attempted to grant an estate of freehold, to commence, as a vested interest, *in futuro.* The deeds were capable of operation as a covenant to stand seised; since there was the consideration of blood between the parties: and a covenant to stand seised may, under the learning of springing uses, give an use to be executed into estate, after the death of the covenantor, if he be seised of an estate in fee as distinguished from an estate-tail; for a tenant in tail cannot raise an use to commence, in terms from and after his death, since on his death the title will be in the

(*d*) Shep. T. 84. Litt. s. 283. Finch's Law, 60. Plow. Com. 160. 154. 1 P.W. 457.

(*e*) 2 Wills. Rep. 75. Willes' Rep. 682.

(*f*) 5 Term Rep. 310.

(*g*) Willes' Rep. 682.

heir under the intail. (*h*) Parts of the judgment in *Roe v. Tranmer*, may with propriety be added in this place. It was delivered by Lord Chief Justice *Willes*; (*i*) and he said,

"It is admitted that this deed will not
" operate as a release, because it grants a
" freehold *in futuro*, which cannot be done.
" The only question, therefore, is, whether,
" in respect to *John Wilkinson*, the lessor of
" the plaintiff, it can operate as a covenant
" to stand seised? If it can, he ought to
" recover in this suit; if it cannot, judg-
" ment must be for the defendants."

And, among other things, he added,
" And we are all of opinion; for my brother
" *Bathurst*, though absent, has given me
" leave to say, that he is of the same opi-
" nion with us, that this deed of release may
" operate as a covenant to stand seised.

" And first, we found our opinion on
" the general rules of law, in respect to
" the exposition of deeds, which are laid
" down in many of the books, and which
" are collected out of them, by *Shepherd*,
" on Common Assurances, p. 82 and 83; in
" which he says that *benigne faciendæ sunt*
" *interpretationes chartarum, ut res magis*
" *valeat quam pereat*; and that *verba inten-*

(*h*) Machel v. Clerk, 2 Lord Raym. 778.
(*i*) Willes' Rep. 683.

" *tioni et non è contrà, debent inservire.* And
" therefore (he says) that deeds, which are
" intended and made to operate one way,
" may operate another way, if the intention
of the parties cannot take place, unless
" they operate a different way from what
" they were intended; and he puts these
" instances (amongst others) that a deed
" intended for a release, if it cannot operate
" as such, may amount to a grant of a
" reversion, an attornment, or a surrender,
" and so *è converso.* And that if a man make
" a feoffment in fee with a letter of attor-
" ney to give livery, and no livery is
" given, but there is in the same deed a
" covenant to stand seised to the uses of
" the feoffment, if this be in such a case,
" where there is a consideration sufficient
" to raise the uses of the covenant, it will
" amount to a covenant to stand seised.
" In the case of *Crossing v. Scudamore,*
" 2 Lev. 9; 1 Ventr. 137, and 1 Mod. 175.
" which I shall mention more particu-
" larly by and by, Lord Chief Justice *Hale*
" cites the opinion of Lord *Hobart,* in fo.
" 277. and declares himself to be of the
" same opinion, that the judges ought to
" be curious and subtle, (Lord *Hobart* used
" the word *astuti*) to invent reasons and
" means to make acts effectual, according
" to the just intent of the parties. And
" it is said, in the case of *Osman v. Sheafe,*

" 3 Lev. 370, and Carth. 397. which I shall
" have occasion likewise to mention again
" presently, that the judges in these latter
" times (and I think very rightly) have gone
" farther than formerly, and have had more
" consideration for the substance, to wit, the
" passing of the estate, according to the
" intent of the parties, than the shadow,
" to wit, the manner of passing it. These
" are the general reasons that we go on;
" and we think that all the particular rules
" that have been laid down in respect to
" covenants to stand seised, all concur in the
" present case.

" I know of no others but these—

" 1st, That there must be a deed.

" 2d, That there be words sufficient to make a covenant.

" 3d, That the grantor or covenantor must be actually seised at the time of the grant.

" 4th, That the intent of the grantor must be plain.

" 5th, That there be a proper consideration to raise the use.

" First, This is certainly a deed; and
" though it cannot operate as a release, it
" being signed, sealed and delivered by the
" party, does not cease to be a deed.

" Secondly, That there are sufficient words
" to make a covenant, I shall shew more
" particularly by and by: but if there were

" no other word, but the word *grant*, that
" would be sufficient, according to all the
" cases.

" Thirdly, It is admitted, and so stated
" in the case, that the grantee *Thomas Kirkby*
" was actually seized at the time of the
" grant.

" Fourthly, Nothing can be more plain
" than that the grantor intended, that the
" lessor of the plaintiff (the nephew) should
" have the estate after the death of *Christo-*
" *pher Kirkby*, (the uncle) without issue: it
" is said so in express words in three places,
" in the deed; what estate he was to take
" is not material at present, he being still
" living.

" Fifthly, Here is a plain consideration, as
" to *Wilkinson* the lessor of the plaintiff; he
" is called in the deed, eldest son of his well
" beloved uncle *John Wilkinson*. If it were
" not so said in the deed, his relation to the
" grantor might be averred and proved ac-
" cording to the case of *Goodtitle v. Petto*,
" 2 Stra. 935, and several cases that are there
" cited out of *Lord Coke's* reports." (g)

" Having mentioned the general reasons,
" and likewise the particular rules on which
" we found our opinion, I shall now mention
" some few cases which I think are autho-

(g) See also Filmer v. Gott, 7 Bro. Par. Cas. 70. Rex v. Scammonden, 3 Term Rep. 474.

"rities in point. I shall not take notice of
"the *antient cases, because of late the courts
"of law have gone much farther in the deter-
"mination of this question*, and likewise be-
"cause there are several rules laid down
"in these antient cases, which are not now
"adhered to."

And then his lordship stated and commented on the cases of *Crossing v. Scudamore*, Tr. 23 Car. 2. in B. R. and P. 26 Car. 2. in Cam. Scacc. reported in 1 Mod. 175. 2 Lev. 9. and 1 Ventr. 137. *Coultman v. Senhouse*, E. 30 Car. 2. B. R. Sir T. Jon. 105. *Walker v. Hall*, 29 Car. 2. in Scacc. 2 Lev. 213. *Harrison v. Austin*, Trin. 3 Jac. 2. B. R. Carth. 38. 9. *Baker v. Lade*, B. C. H. 2 W. and M. 3 Lev. 291. and *Osman v. Sheafe*, 3 Lev. 370. 5 W. and M.

And in *Shove v. Pincke* (a) it was certified by the court of King's Bench, that an instrument in the form of an appointment, under a power, and ineffectual as an appointment, operated as a grant of the inheritance, expectant on a term of years. Mr. Justice *Buller* observed, "the thing conveyed is a *reversion*, that is, the subject of a grant; and the words *limit and appoint* operate as a grant."

The cited cases of *Lewis Bowles Hooker*

(a) 5 Term Rep. 124. 310.

and *Hooker*, and of *Cordal*, shew the application of the learning of surrenders to contingent remainders, when these remainders are inserted between two or more vested estates of freehold in the same person. The distinction to be collected from these cases (*b*) is attempted in the Essay on the Quantity of Estates, in the chapter which treats of curtesy.

It is clear also, that a mesne contingent freehold interest, may be destroyed by the surrender of the tenant of a preceding estate of freehold, to the tenant of the next vested estate of freehold, if it be as large as or larger than the prior estate. But the doctrine of merger, or mere act of law, will not destroy contingent interests in the same instant in which they are limited, nor in any event, nor under any circumstances, unless a new and distinct act, (as a descent) shall take place, or (as a conveyance) shall be made at some period after the contingent interest is originally created. Of the nature of such act, and of the circumstances under which it must be made or take place, some further observations will be subjoined in a division to be set apart for the purpose.

It is obvious that a vested estate cannot merge in a *contingent* interest. It would

(*b*) Ess. on Est. Chap. Curtesy.

therefore be useless to insist on these points by any comment.(*b*) For the same reason it follows that a present vested term cannot merge in an *interesse termini*. Under an *interesse termini* there is not any subsisting estate in which the vested estate may merge.

That an *interesse termini* or a contingent remainder may be *extinguished*, in a vested estate under the learning of extinguishment, is admitted; but this does not contravene the doctrine which has been advanced.

The cases on *implied surrenders* may also appear to justify a conclusion different from that which has been drawn. The answer is, that these cases do not depend on the doctrine of merger. It is true they are connected in some degree with the reason on which the law of merger depends. Cases of implied surrender seem to have been determined on the ground of inconsistency in the several contracts. (*c*) It is impossible that the former contract can continue in force, and the second contract operate according to the intention of the parties, as expressed in that contract. (*d*) From this inconsistency, the law draws the conclusion, that the former contract has been abandoned, and that the parties have en-

(*b*) But see Goodright v. Searle, 2 Wils. 29.

(*c*) 1 Inst. 338. a.

(*d*) Ives' Case, 5 Rep. 11.

tered into a new agreement. This is the only mode of reconciling the intention with the terms of the agreement. However this relinquishment of the former contract is not a surrender in the technical sense of that term. It is rather an *implied release,* or waiver of the former agreement, than a surrender arising under that agreement. The inconsistency of the two agreements is the ground for presuming that the former contract has been abandoned and annulled. On similar ground an inconsistent covenant, as a covenant not to sue at any time, as distinguished from a covenant not to sue for a particular time, amounts to a release, unless there be an apparent intention to the contrary. (*f*)

The case of *Goodright* v. *Searle,* (*g*) is also a case of extinguishment, not of merger.

That the conclusion may be drawn on which a surrender is implied, it must be impossible that the several contracts should operate in the terms in which they are expressed. It is, necessary, therefore, that some part of the time for which the parties have stipulated by the first lease, should be comprised in the time limited by the second lease; so that it may appear that the parties must have intended that the right of

(*f*) Aloff v. Scrimshaw, 2 Salk. 573 Shep. T. 251. Clayton v. Kynaston, 2 Salk. 573.
(*g*) 2 Wils. 29.

enjoyment for some part at least of the period for which the lands are held, under the terms of the former lease, shall be held under the stipulations of the new lease. This is the point of inconsistency which alone affords the necessary degree of presumption. When this circumstance occurs, it is immaterial whether the second lease is to commence immediately, or from a future time, and also whether, in point of duration, it is to be more or less extensive than the former term. The inconsistency is equally manifest; and the law feels equal necessity for the same conclusion. Sometimes it has been supposed that the first lease would be avoided, notwithstanding the demise, intended to be made by the second lease, is void, and never has any operation. The principle on which this opinion was formed, proceeded on the idea that the second contract disclosed evidence of a change of intention, from which an agreement might be implied, that the former contract should cease to be binding on the parties; and on the same reasoning, that a will may be revoked by an informal or an inefficient conveyance denoting a change of intention.

However, in *Davison* on the demise of *Bromley* v. *Stanley*, (g) Lord *Mansfield* ruled

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(g) 4 Burr. 2210.

Whitting v. Gough, Dyer 140. Lloyd v. Gregory, Sir William Jones, 405.

that the acceptance of a second good lease would operate as a surrender of the former: but he declared the reason did not hold in the case of accepting *a new void* one, that the lessee cannot enjoy; that there was no inconsistency in the acceptance of a new good lease being a surrender of the former. But the accepting a new void lease, which the lessee was not to enjoy, could not shew an intention to surrender the other, and that therefore the reason why this should be an implied surrender totally failed; and that he was very clear the acceptance of this new lease, which did not pass an interest according to the contract, could not operate as a surrender of the former; and the principle was followed in *Roe* on the demise of Earl *Berkely* v. Archbishop of *York*. (*i*)

(*i*) 6 East, 86.

CHAP. XI.

That the more remote Estate must be as large as, or larger than, the more immediate Estate; and, under this head, the Gradation of Estates will be examined.

THIS is the most important head for consideration. For it is an indispensable circumstance, that the more remote estate should be larger than, or at least as large as, the preceding estate. (*a*) A case in *Brooke's Abridgment*, (*b*) is an illustration of this point. A man leased for a term of years, and afterwards took an interest for term of life, to take effect immediately: there the lease for years is extinct; but where one leases to I. N. for term of life, and twenty-years over, there he shall have both estates; for in the other case both are in him at the same time and together. (11 Hen. 4. 34.)

(*a*) 1 Inst. 54. b.
(*b*) Bro. Abr. Exting.

These cases exemplify the general proposition, and shew its application.

They establish also the alternative to the proposition, by affording the example of a case to which the doctrine of merger does not apply. In the first instance, the estate for years was merged, because the more remote estate was for life, and because an estate for life is larger than an estate for years; and in the second instance, the estate for years, was a continuing interest, because this term was the more remote estate, and an estate for life is larger than an estate for years.

So where land was given to husband and wife, and to the heirs of the husband; the husband made a lease for years, and died: the wife entered and inter-married with the lessee: and it was moved,—If the interest of the lessee was extinct by the inter-marriage. And it was held that it was not; for it was but a possibility, and not an interest. Cited by *Coke*,(c) and agreed to by the whole court. On this case it is observable that the several estates were vested in different rights.

Besides, after the entry of the wife, her estate was prior to the term; for the term was, as against her, derived out of the inhe-

(c) 3 Leon, 157, 8.

ritance, and that inheritance, and consequently the term, was the more remote estate.

Again,(*d*) if a man letteth lands to another for life, the remainder to him for twenty-one years, he hath both estates in him distinctly, and he may grant away either of them; for a greater estate may uphold a lesser, but not *è converso*; and therefore if a man make a lease to one for twenty-one years, the remainder to him for term of his life, the lease for twenty-one years is drowned.

If I grant an annuity for life, and twenty years after, (*e*) these are two several grants, and the executors shall have the years after the death of the tenant for life. In fact, there are two several estates, as much as if they had been limited by distinct clauses. The leases of the corporation of Liverpool are of this description.

These cases turned on the gradation of estates, and the gradation of estates depends on technical reasoning. In legal consideration, estates of freehold are of larger extent, than those of chattel interest; and estates of inheritance are of larger extent than estates of mere freehold.

Under interests of inheritance are classed, 1st, Estates in fee-simple.

(*d*) Jenk. Cent. 248. pl. 37.

(*e*) Brownlow, 19. Mordant v. Watt.

2d, Determinable fees, qualified fees, conditional fees.

3d, Estates-tail.

And under estates merely of freehold may be classed,

1st, Estates after possibility of issue extinct,

2d, Estates for life absolute, or determinable.

Chattel interests are,

1st, Estates for years,

2d, Estates for uncertain times by devise or limitations of use.

3d, Estates by statute merchant, statute staple, and elegit; and,

4th, Estates at will.

Of the Gradation of Estates.

Of all estates a fee-simple is the most extensive. It may comprehend all the other interests or times of continuance. Estates of an inferior degree, except the other estates in fee which have been enumerated, are called particular estates, or estates giving a particular portion of time, as contrasted with time indefinitely; and time indefinitely, is the extent of an estate in fee. Consequently either of the particular estates which have been enumerated, may merge in a fee-simple.

Next in order for extent, are determinable fees, qualified fees, and conditional fees. On the extent and superiority of these estates over each other, it is difficult to decide. No line exists by which their extent can be compared; they seem to be equal to each other without any superiority of one over the other, except one of them be derived out of the other, and then the derivative interest must, of necessity, be the inferior estate.

Next in order are estates-tail; and, while they continue in the tenant in tail, and privileged in favor of the issue in tail, under the statute *de donis*, they cannot, as will be more fully shewn in a subsequent chapter, merge as against the issue.

After this privilege is taken away, or the estates are in the tenure of assignees of this estate, the estates are changed either into determinable fees or estates-tail, after possibility of issue extinct; and estates-tail after possibility of issue extinct, are mere estates for life, and in either of these qualities they may merge. (*f*)

Estates-tail are of a peculiar nature. They admit of enlargement into fees-simple: and in some cases they may, by the failure of possibility of issue, be reduced to estates for life. In this respect they differ from other

(*f*) Lewis Bowles's Case, 11 Rep.

estates which necessarily continue of the same extent. The extension of estates-tail into fees-simple depends on the power of alienation, conferred on tenant in tail. The reduction of this estate into an estate for life, when it is in favor of the issue of one person by another, depends on the particular quality of that estate. The alteration arises from a certain and natural impossibility that there ever should be any issue to inherit under the intail.

When tenant in special tail continues the owner of that estate, and the person by whom, or on whose body, the issue are to be begotten dies, and there is a failure of the issue inheritable under the intail, that person will, from the failure of issue, become tenant in tail after possibility of issue extinct. In the tenancy of any other person the estate would be a mere estate for life; and even in the tenancy of the tenant in tail, it is, in point of extent, and power of alietion, no more after the possibility of issue has ceased, than an estate for life. And though a tenant in tail, while there is a possibility of issue inheritable under the intail, may, by his grant or conveyance, not being a common recovery or creating a discontinuance, convey a determinable fee; yet if he was tenant in tail, special as to the person by whom, or on whose body the issue are to be begotten, so that there is a failure of such

issue, and it is become impossible by the death of the person by whom or on whose body the issue are to be begotten, that there should be any issue of the given description; then the person who originally took a fee, as his assignee, will by a failure of these issue become a tenant merely for the life of the donee in tail; and his estate must, for all the purposes of merger, and, it is apprehended, for every other purpose of tenure and benefit, be considered only as an estate for life; and as to him it will be an estate *pur autre vie;* in other words, an estate for the life of the tenant in tail.

Estates-tail general as to the heirs of the person by whom or on whose body the issue are to be begotten, though special as to the sex of the persons to be inheritable under the intail, cannot become estates after possibility of issue extinct; because the law will not presume an impossibility of issue, and from a parity of reasoning, they cannot become mere estates for life in the tenancy of a person being an assignee under the tenant in tail.

Estates in tail, which in their creation are special, as to the persons by whom or on whose body the issue are to be begotten, will, on their descent to the issue intitled under the form of the gift by which that intail is created, become an estate in tail general as to the persons by whom or on

whose body the future issue are to be begotten; and therefore his assignee will continue to have a determinable fee, since the heir under the intail, could not be reduced to the state of a tenant for life, as there must always be a possibility of issue, inheritable under the intail.

The change of a determinable fee, arising from the transfer of an estate-tail, into an estate for life, may in some cases raise a point on the learning of dower. It is clear that a woman is not dowable of a mere estate for life, though that estate be descendible or rather transmissible to the heirs. The heirs take as special occupants; and as the estate is not of inheritance, the wife cannot be dowable in right of that estate. It is equally clear that a woman is dowable of a determinable fee, subject, except in some particular cases, to have her right of dower defeated when the estate of her husband determines. In the case under consideration the husband may have a determinable fee at one time, and an estate for life at another time.

A seisin of the inheritance during the coverture will confer a title to dower.

Can this title, when it has once attached, be defeated by the change of the estate of inheritance into an estate for life? This is the point to be discussed, but it is not easily solved. No decision which throws any light on the question has been found.

There is reason to think that as the wife was once dowable of her husband's seisin, no change in the *quality* of her husband's estate, will defeat that right of dower, as long as *the husband's estate continues. For it should seem the* heir will take by descent, as heir, and not merely as occupant ; and yet after the failure of the issue this is questionable. The wife claims only on the ground of a seisin of the inheritance, and not of the estate, after it becomes a mere estate of freehold.

Perhaps it may be contended, that the grantee has continually an estate of inheritance, even after the possibility of issue is extinct. But it would be difficult to maintain that proposition, and therefore, a wife whose claim of dower rests solely on her husband's seisin, after the possibility of issue is extinct, appears to have little chance of success in a suit to establish a right of dower.

Next follow estates for life. In this class, are included,

1st, Estates for the life of the party.

2d, For several lives.

3d, For the life of another person ; and,

4th, For the joint lives of several persons.

And these estates are denominated, according to the nature and form of the several

limitations, and the estates, or degrees fo interest they confer.

Under estates for the life of the party himself, may be ranked,

First, The estate of tenant in tail, after possibility of issue extinct.

Secondly, Tenant by curtesy. And,

Thirdly, Tenant in dower, and tenant for his own life, by express limitation, or construction of law.

But estates which originally, and in the first instance, are estates for the life of the party himself, may, by a change of tenancy, become an estate for the life of another person, or, in technical phraseology, *pur autre vie;* as is fully shewn in the *Essay on the Quantity of Estates,* in the chapter which treats of estates for life.

So estates, which, in the tenancy of one person, are *pur autre vie,* may, by a change of the tenant, become estates for the life of the tenant himself.

Next come estates *for years,* which are all of the same nature, though they may be different in their extent; and after them, or in the same degree with them, as of equal extent, the other chattel interests which have been mentioned, and lastly, estates at will.

Now any estate of an inferior degree,

and which, in *intendment of law*, comprizes less time than another, may merge in such other estate, so as the other requisite circumstances concur.

Of the Merger of Estates at will.

From the positions already advanced, it will be collected, that an estate at will, will be merged by the accession or acquisition of an estate for years. This is a deduction so necessary, even from the nature and qualities of an estate at will, independently of the doctrine of merger, that no doubt can be entertained on the point. No adjudication, indeed, is to be found on this particular case. The conclusion, however, is clear, and easily reconciled, without any authority, by considering it almost impossible, that a question should ever have been raised, on the application of the law to those circumstances. It is the nature of an estate at will, to continue so long only, as the tenant and his lessor shall both please: therefore it necessarily follows, that when the lessee obtains a further interest in possession from the lessor, the will is determined; for many reasons, and among them, that by taking an estate in reversion, the lessee has shewn that his will to hold the possession under the lessor, hath ceased. On the same ground, the tenant,

under an estate at will, is capable of a release in enlargement of his estate, as has been shewn in the second volume.

Of the Merger of Estates by Extent, &c. in each other, and in Estates for Years, &c.

An estate by extent on a statute, may merge in another estate by extent.

It is generally admitted, that this point was decided by the determination of the case of *Dighton v. Grenville*: (a) and that case certainly is an acknowleged authority for this conclusion. Both parties agreed in admitting the application of merger, as between the several interests held under two estates, claimed under two extents, and vesting in the same person.

That case will be fully stated in examining the effects of merger, and the consequences which it induces; and some strictures will be made on that case. In this place, it is sufficient to observe that there may be a merger between estates held in this manner; and it follows, that all other estates of a chattel quality by extent, execution and devise, are within a parity of reason, and must be equally influenced by the authority of the case of *Dighton and Grenville*.(b)

(a) 2 Ventris, 231. Collis's Par. Cas. 64.
(b) See Vin. Abr. Merger.

Again, estates by extent, &c. may merge in estates for years.

It follows, that estates by extent, may merge in any other estates of a higher degree than estates for years. Therefore, where tenant by elegit, accepts a confirmation for term of his life, he is in by the tenant of the freehold, and not in the *post*, by the act of law, as he was before. A consequence flowing from this deduction is, that if the tenant of the freehold has charged the land between the execution made on the extent, and the confirmation, the tenant by extent accepting the freehold, shall hold charged, notwithstanding he was discharged while he held under the extent.(*c*)

Also where tenant by statute merchant, or of the like interest, brings an assize, and, pending the writ, the fee-simple descends to him, the writ will be abated; for the descent of the greater estate extinguishes the lesser.(*d*).

And it is to be added, that if a tenant by extent, purchase the inheritance of part of the lands extended, the whole falls. This is partly on the ground of extinguishment, and not merely and simply under the law of merger.(*e*)

(*c*) Bro. Exting. 30, 31. Ass. pl. 13.

(*d*) Bro. Exting. 56. ib. Briefe 419. 32 H. 6. 30.

(*e*) Haydon and Vavasor v. Smith, Moor. 682.

And hence the observation of Mr. Justice *Ventris*,(g) if the inheritance of part of the land extended comes to the conusee; it destroys the whole extent; whereas if a *lessee for years* purchase the reversion of part, the lease holds for the rest: he added, but in case of an extent, if there should be only a partial merger, the conusee would, it is said, hold the residue of the land longer, because the profits that should go in satisfaction of the debt, must be less, and this would be to the wrong of him in the reversion. But in other respects an extent makes an estate in the land, and hath all the properties and incidents of, and to, an estate, and doth in no sort resemble such an interest as is only a charge upon the land. He further added (and the observation is useful, as elucidating the subject,) an interest by extent is a new species of an estate introduced by statute law: our books say, that it is an estate created in imitation of a freehold, and *quasi* a freehold; but no book can be produced, that says, that it is *quasi* an estate.

The statute of 27 Edw. 3. c. 9. enacts, that he to whom the debt is due, shall have an estate of freehold in the lands; and

(g) 2 Ventr. 327.

the statute of 13 Edw. 1. *de mercatoribus,* says, that he shall have seisin of all the lands and tenements.

When a statute is extended, it turns the estate of the *conusor into a reversion;* and so are the express words in Co. 1 Inst. 250. b.; and so the objection, that he does not hold by fealty is answered, and there are no tenures that are to no purpose; but he that enters by virtue of a power to hold, till satisfied an arrear of rent, he leaves the whole estate in the owner of the land, and not a reversion only. [A proposition, which is not found in the book,(*h*) and cannot safely be adopted, without caution.] He proceeded.

"If a lease for years be made, reserving "rent, and then the lessor acknowledge a "statute, which is extended, the conusee "after the extent, shall have an action of "debt for the rent, and distrain and avow "for the rent, (as in Bro. tit. stat. Merch. "44. and Noy, fo. 74.) but he *that enters* "by a power to hold for an arrear of rent, "shall not." [The real point is, he cannot enter.]

"Again, he in reversion may release to "the tenant by extent, which will drown "the interest, and enlarge his estate, accord-"ing as it is limited in the release, Co.

(*h*) 1 Saund. 112.

" 1 Inst. 270 b. 273. Tenant by statute may
" forfeit by making a feoffment, Mo. 663.
" He is to attorn to the grant of reversion,
" 1 Roll. 293. and is liable to a *quid juris*
" *clamat*. 7 H. 4. 19. b. Tenant by extent
" may surrender to him in reversion, 4 Co.
" 82. *Corbet's* case; therefore these cases
" are to shew, that an extended interest
" makes an estate in the land, as much as
" any demise or lease.

" And I take it, the consequence of that
" is, that when an estate by extent is evicted
" by an extent upon a prior statute, or
" where the pri r statute is first extended,
" and then a statute of later date is ex-
" tended; in both these cases, the extent
" upon the puisne statute, will be in the
" nature of a reversional interest.

" A reversion is every where thus de-
" cribed; viz. an estate to take effect in
" possession after another estate deter-
" mined. It [the estate under a second
" statute] is not in nature of a future in-
" terest, as a term for years limited, to
" commence after the end of a former term;
" for such an one shall not have the rent
" upon a former lease; but he that extends
" upon a lessee for years shall; for the libe-
" rate gives a present interest to hold *ut*
" *liberum tenementum*, but indeed cannot
" take effect in possession, by reason of a
" prior extent, or by prior title."

"And this is the very case of a reversion. "which is an actual present interest, though "it be to take effect in possession after "another estate."

Under this head, it remains to be added, that an estate under an extent, interposed between two other estates, by extent or otherwise, is a mesne estate, which will prevent merger.(*a*)

Of the Merger of Estates for Years in each other.

The first proposition to be advanced in regard to the merger of terms for years is, that a term of years derived by way of under-lease, out of a term of years, may merge on their union. (*b*) In this instance, there is the relation of lord and tenant (*c*) between the parties, (*d*) and after the merger, the original term will be in the same state in point of duration of title, and right of enjoyment, except by reason of mesne incumbrances, as if no underlease had been created.

Again, an estate for years may also merge in another estate in reversion, of the same

(*a*) 2 Ventr. 332.

(*b*) See Wood's Case, cited Cro. Eliz.

(*c*) 2 Ventr. 327.

(*d*) Hughes v. Robotham, Cro. Eliz. 302

denomination; and it seems, that the law does not allow of any difference, when the reversion is for a longer or shorter space of time, than the former or preceding estate: however, it has been said that lessee for ten years, cannot surrender to lessee for twenty years, though the ten years are derived out of the twenty years; but the contrary has been expressly determined.(*e*)

Again, it has been said that one estate for years cannot drown in another. This is the language of *Sheppard* in his Touchstone. (*f*) The example which he has propounded, and to which his conclusion is applied, is in these words:

"If one make a lease for ten years, the "remainder for twenty years to another, "and he in remainder releases all his right, "to the lessee for ten years; in that case "the releasee hath an estate for thirty "years and no less; for one lease for years "cannot drown in another."

Lord *Coke* (*g*) in his commentary on *Littleton* has advanced a proposition to the same effect; and it is to this author that *Sheppard* refers.

The text of Lord *Coke*, is, that if a man lease for ten years, the remainder for twenty

(*e*) Owen 97. Cro. Eliz. 173. 1 Leon. 303. Pop: Rep. 30.
(*f*) p. 341.
(*g*) 1 Inst. 273.

years, he in remainder leases all his right to the lessee, he shall have an estate for thirty years, for one chattel cannot drown another, and years cannot be consumed in years.

The cases cited in the margin to Lord *Coke*, are 1 Leon. 303, 328. There is another reference to his own text in a former page, in which, however, no passage applicable to the point under consideration is to be found.

The case in 1 Leon. 303. is *Pery* (more properly *Perry*) and *Allen*.

In that case lessee for thirty years leased for nineteen years, and then the first lessee and a stranger agreed that the lessee for nineteen years, should have a lease for three years, in the same and other lands, and that this new lease should not be a surrender of the first term; but the lessee for nineteen years, did not agree or assent to this arrangement; and it was the opinion of all the justices of the court, that the sale was not any surrender: and so far the case is correct; for there could not be a surrender of the estate of the lessee for nineteen years without his concurrence, for an agreement between two persons cannot amount to a lease to a third person or a surrender of his estate. The report adds, that one termor could not surrender to another termor. It

is this opinion (*h*) which raises a difficulty on the law on merger, of one term of years in another term of years.

Against the general proposition at the conclusion of that case, and in other cases, that one termor cannot surrender to another termor; and against the still broader proposition in *Coke*'s report of the same case, and in *Leonard's* Rep. of *Willes v. Whitwood*, that when lessee for twenty years maketh a lease for ten years, the second lessee cannot surrender to the first lessee, for ten years cannot be drowned in twenty, it may be safely alleged that the proposition is not law, for it is clearly settled that one termor may surrender to another ;(*i*) at least, when the surrenderee has the reversion for years. This point is examined and very ably discussed, and this conclusion upon it drawn by Lord Chief Baron *Gilbert* in his chapter on leases inserted in *Bacon's* Abridgment: (See Gwillim's Bac. IV. 211.) *Mr. Hilliard*, in his note to Sheppard's Touchstone, also observed that a surrender to him, who has a greater estate for years, is good, as to him that has an estate for life; and where the surrender is to a termor *in reversion*, it is all one if the reversioner had a greater estate for

(*h*) 1 Leon, 322.

(*i*) Hughes v. Robotham, Cro. Eliz. 302.

years or not: Cro. Eliz. 302. Vin. Abr. Merger G. And the determination in the case of *Hughes v. Robotham* might be, and most probably was, founded on the special agreement of the parties, which certainly afforded strong grounds to decide that a second lease gave a future term, reversionary in point of right, and not vested in estate; so that the right under that lease was merely an *interesse termini*, and therefore could not be the cause of merger: and this case differed widely from the case on which an opinion is expressed in *Perry v. Allen*, since in that case, there were two actual vested estates, and one of them was *derived* out of the other. The other case to which reference is made in the margin to Co. on Litt. is *Willes v. Whitewood*, 1 Leon. 322. So far from warranting the text, that case favors the opinion advanced in this treatise, asserting that one term may merge in another. In that case A. was seised of lands held in socage, and leased the same to I. S. for many years, and died his heir within the age of fourteen years. The wife of A. being guardian in socage, leased the same land by indenture to the same I. S. for years; and the question for the opinion of the court was, whether the first lease was surrondered or determined: and *Anderson* is reported to have said, surrendered it cannot be; but then the reason he gave was

that the guardian had *not any reversion* (i) capable of surrender, but only an authority given to her by the law, to take the profits to the use of the heir: and he proceeded to observe, "But yet perhaps it is determined by consequence and operation of "law," as if A. lease to B. for one hundred years, and afterwards, granteth the reversion to C. for two years, who leaseth to B. for two years who accepts the lease, the same is not any surrender; for a term of one hundred years cannot be drowned in a reversion for two years, yet the first lease is determined. This *Periam* granted.

These expressions do not communicate the opinion of the court, in a very accurate manner. Still it is highly probable that the annihilation of the first term, is ascribed to that operation of the law, which is denominated implied surrender. The opinion was certainly founded on the principle, that an estate in possession, and an estate in reversion, of equal quantity in point of duration, cannot subsist in the same person: and upon what other ground than the doctrine of merger, can this opinion be supported? It is clear that the court thought there was not any surrender in *fact*. To suppose such a surrender was contrary to the intention of

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(i) Roe ex dem. Parry v. Hodgson, 2 Wilson, 129, 135.

the parties, and the internal evidence of the transaction before the court: what then was the scope and application of the opinion that the second lease was not any surrender? or the reason which was assigned, that a term of a hundred years cannot be drowned in a reversion for two years? or of the conclusion that the first lease was determined? The whole must be understood to have amounted only to a declaration, that although a lease for a hundred years, comprizes more time than two years, so that the period of two years in reversion cannot embrace the period of a hundred years in possession; still, by the operation of law, the term in possession will be annihilated by its union with the term in reversion. In any point of view the opinion delivered in *Hughes v. Robotham* is inconsistent with the general conclusion of *Lord Coke*. At the same time it must be acknowledged that the deductions are open to some objections; to one arising from an observation on the last case, which was made by Mr. *John Windham*, that if a lease be made to begin at Michaelmas, and before that time the lessor makes a new lease to the same lessee to begin presently, the same is not any surrender, and yet thereby the first lease is determined, and so in the principal case which *Anderson* granted to another, from the circumstance that in the case sup-

posed by *Lord Coke* the second term was a *remainder*, and not a reversion.

The objection founded on the assertion made by *Windham* to the acceptance of a second lease is easily answered. It proves rather than negatives, the application of the doctrine of merger, to the case before the court. It shews that there may be a surrender in law, though there neither is nor can be a merger in fact. This case, however, turned on the new agreement. (*k*) Every lease for years takes effect by contract; and the same may be discharged by another contract equally solemn. It is on these grounds that by the acceptance of a new lease to commence immediately, an *interesse termini* is discharged, if the second lease interfere with any part of the time of continuance granted by the former lease: for the two contracts are inconsistent, and therefore an agreement to relinquish the former contract, must be presumed. On the same ground, if lessee for ten years accepts a new and effectual lease, even for an *interesse termini*, which includes any part of the period of continuance of the former term, (*l*) that term will be discharged: but the decision of cases of this sort has turned on the inconsistency

(*k*) Ive's Case, 5 Rep. 11.
(*l*) Com. Dig. Surr.

of the contracts, and not on the operation of the law of merger.

In the other objection there is more weight. Though there be a *privity* of estate, there is not any *tenure* between a tenant for years, in possession, and a tenant for years in remainder; and this affords ample grounds for an inquiry into the existence of any distinctions arising from this circumstance, and that inquiry will be instituted under a head to be set apart for the purpose.

To recur to the point whether one term may or may not merge, in another term. That the law is in the affirmative, when one of the terms is the reversion or part of the reversion, expectant on the first term, appears to be very clear from *Hughes v. Robotham*, Cro. Eliz. 302. In that case the plaintiff declared upon an *assumpsit*, stating that he was possessed of a lease for years, and that the testator was possessed of the reversion for years; and that the testator, in consideration that the plaintiff would *surrender* to him all his estate, promised to give him thirty pounds, and the plaintiff alleged a surrender in fact. The defendant pleaded *non-assumpsit*, and the plaintiff obtained a verdict. One of the grounds of a motion, made in arrest of judgment was, that the parties were termors, one in possession, the other in reversion; and that a termor cannot surrender to a termor, as it was

alleged, for one term cannot drown in another. And to this point *Popham* said, "it "is clear that *he which hath an estate for ten years, may surrender to him that hath" an estate for twelve years, and the estate is "drowned, and the other shall come into pos-" "session;* and there is no doubt but a sur- "render to him that hath a *greater estate* "*for years*, is good, as to him that hath an "estate for life."

This *Gawdy* expressly affirmed, and it was added, "*here it standeth* indifferent, if the "reversioner had a greater estate for years "or not: and *Popham* conceived that if the "testator had the reversion, for a *less num-* "*ber of years*, still the surrender was good, "and the estate should drown in it; and" which is material to the point insisted on, in this treatise, "if a man be lessee for "twenty years; and the reversion is granted "for one year to another, who *grants* it to "the lessee for twenty years, this is a sur- "render of the first lease for twenty years, "and is as if he had taken a new lease for "a year of his lessor." This was also affirmed by Justice *Fenner;* and he said the surrender was good, although the reversion was *for a less term of years;* "for he observed "here are several terms out of the reversion, "and one cannot stand with the other, but "coming together, one shall drown the "other, and the *number of years* is *not ma-*

" *terial;* for as he may surrender to him
" which hath the reversion in fee, so he may
" to him that hath the reversion for a lesser
" term."

From the report given of the opinion of *Popham*, and the reference which he made to the *grant* of the reversion for one year to a person who granted it to the owner of a previous and subsisting term of twenty years; and his observation, that this was a surrender of the first lease, and was as if he had taken a new lease for a year of his lessor, it may possibly be concluded that he considered the two cases as parallel, and depending on the same reasons and the same principles of law. But this passage is not to be understood in that sense, or as containing an assertion that merger is to be supported on the same grounds, as those cases in which one lease is vacated by the acceptance of another lease incompatible with the former. *Popham* meant to shew the *effect*, not the *cause*; and his conclusion was that the accession of one estate to another immediately expectant thereon, produced precisely that effect which flows from the acceptance by a lessee of a new lease, comprizing part of the time of his subsisting term.

The conclusions to be drawn from the case of *Hughes v. Robotham* are highly important to the point under consideration.

At first view it appears that the opinion of the court was confined to the doctrine of surrender; but on a closer attention to the case, and a more minute examination of the circumstances, it will be obvious that throughout the whole case, the court had the doctrine of merger in their contemplation, and drew their inferences from surrender to merger; establishing, by their opinion, the general proposition, that whenever the tenant of one estate may surrender to the tenant of the other estate, the two estates will merge, as often as they meet in one and the same person. Besides, some of the observations made on the case were so immediately referred to the doctrine of merger, that their application cannot be mistaken. The instance of a lease for twenty years, and the grant of the reversion for one year to another, who grants it to the lessee for twenty years, admits of no doubt on its application. Though it is said this is a surrender of the first lease for twenty years, the court could not have meant that it was a surrender in fact. They must have intended to express that it was a surrender in law, which, in truth, is nothing more or less than that operation, which is more generally, if not more accurately denominated a merger, or extinguishment of one estate in another. It is essential to the effect of a surrender, that the first termor should surrender to the

person who has the next immediate and expectant estate; while the example urged by the court was the *grant*, by the tenant, of a separate and distinct estate in *reversion* to the tenant of a *prior* term. The observations of *Fenner*, that there were "several terms out of the reversion, and one could not stand with the other, but, coming together, one should drown," was equally as applicable to the doctrine of merger, as to the doctrine of surrender. In short, it seems to be a general rule, that when two estates come into the hands of the same persons, by different conveyances, they will merge as often as the owner of one of these estates, might, from the relative situation and connexion of the several owners as tenants, have surrendered to the other of them with effect: so that the law does every thing, which the parties themselves could have done; proceeding perhaps on the broad ground, that the proper conveyance between two persons who hold two estates, one expectant on the other, is a surrender, and that all modes of conveyance between them which correspond with a surrender, by giving to one tenant the estate of the other tenant, shall have the like effect; and disregarding the circumstance which sometimes occurs, that one person, who has the more remote or reversionary interest, is the person whose estate is the

subject of alienation. And in *Whitchurch and Whitchurch*, (*a*) it seems to have been taken for granted that one term for years, may be annihilated by its accession to another estate for years. Unless this had been admitted, the counsel and also the court would have denied that there was any ground for supposing that a merger had taken place. By arguing the case on its particular circumstances, as an answer to the doctrine of merger, they tacitly allowed that that doctrine would have been applicable unless these circumstances had existed. These cases of *Hughes v. Robotham*, and *Whitchurch and Whitchurch*, also establish the point, and in the most decisive terms remove the objections to the contrary, that one termor may surrender to another, and that one term may drown in another, and *Hughes v. Robotham* has a point which leads still farther. It affords authority for the conclusion that one term may merge in another, which is of shorter duration: indeed, with a view to the doctrine of merger, *every term is equally extensive* in quality at least. Each is as large an estate, though not for as much time, as the other; and therefore one term may well merge in another: and Mr. Justice *Ventris*, in his elaborate argument on the case of *Deighton v. Greville*, draws this conclusion, that when the interest

(*a*) 2 P. W. 236.

of the first *extent* and the latter come into one person, (*a*) the first must be drowned; and he reasons the point by observing that an estate for years or other chattel interest will *merge* a chattel in *reversion,* that is immediately expectant, and that was, he observed, *Hughes v. Robotham's* case in the 1 Cro. 302. So that it is evident he considered *Hughes v. Robotham* as a case of merger and not of surrender. One of the principal objections to the weight ascribed to the case of *Hughes v. Robotham* is, that *Popham* has reported the same case, and is silent on the point of merger. It is true there is not in his report any direct reference to the doctrine of the law of merger; but all the learning respecting the right of one termor to surrender to another termor, who has a reversion expectant on the first term, will be found in *Popham's* as well as *Croke's* report: and the judgment in that case rested on the point that the term in possession was merged in the term in reversion. *Gawdy* is reported to have said, he who hath ten years in possession, may well surrender to him who hath more years, as twenty in reversion, for the lesser may surrender to the greater term: and *Popham* and *Fenner* assented to this doctrine; and *Popham* added, though *Robotham* had a

(*a*) 2 Ventr. p. 326.

lesser term in the reversion than *Hughes* had in the possession, yet the same shall be good, for in *law it is greater and more beneficial for him to have a lesser term to be a termor in possession, than to have it to be in reversion.* Of the learning on this subject, the Chief Baron Gilbert, (*a*) with those abilities for which he was so eminently distinguished, has taken a very elaborate and comprehensive review, which is expressed in these terms :

" It appears by the definition before " given of a surrender, that the same is a " yielding up of an estate for life, or years, " to him in the immediate reversion or re- " mainder ; but here a question may arise, " what estate in the reversion or remainder " will be susceptible of such surrender ; " for if the estate in reversion or remain- " der be but for years, it seems a great doubt " in the books, whether a lease for years in " possession may be surrendered so as to " merge and drown therein ; and it is com- " monly said, that years cannot drown in " years ; therefore, where lessee for twenty " years made a lease for ten years, and the " lessee for ten years surrendered to his " lessor, this has been held to be no sur- " render, so as to merge the ten years in pos- " session, but only to transfer them by way " of assignment or accession to the number

(*a*) Gwillim's Bacon, 4 vol. p 211.

" of years then left in the lessor; for that
" years could not drown in years. But the
" contrary to this has been held with some
" clearness; and it seems to be now settled,
" that such surrender is good, and shall
" merge the first term; wherein it was
" agreed, 1st. That if the term in rever-
" sion were greater than the term in pos-
" sion, that the greater would merge the
" less, as ten years may be surrendered and
" merge in twelve or fourteen years. 2d,
" It was held by *Gawdy*, *Fenner*, and *Pop-*
" *ham*, that though the reversion were for a
" less number of years, yet the surrender
" would be good, and the first term drown-
" ed; as if one were lessee for twenty years,
" and the reversion expectant thereupon
" were granted to one for a year, who
" granted it over to the lessee for twenty
" years, that this would work a surrender
" of the twenty years term, as if he had
" taken a new lease for a year of his lessor;
" for the reversionary interest, coming to
" the possession, drowns it, and the number
" of years is not material; for as he may
" surrender to him who hath the reversion
" in fee, so he may to him who hath the
" reversion for any less term: and therefore
" *Popham* held, that where lessee for twenty
" years makes a lease for ten years, and the
" lessee for ten years surrenders to his
" lessor, viz. the lessee for twenty years,
" that this is good, and the lessor shall have

" so many years as were then to come of the
" term of twenty years, that is, as it seems,
" so many years as were to come of his
" reversion, shall now be changed into pos-
" session: and he held further, that if such
" lessee for twenty years, had made such
" lease for ten years, and then granted over
" the reversion for ten years only; viz. no
" longer than the lease for ten years was to
" continue, and such lessee for ten years had
" attorned, then the grantee of the rever-
" sion, should have the rent and services,
" and the grantor, the residue of the
" twenty years; and that the lessee for ten
" years might surrender to the grantee, of
" the reversion for ten years, and he there-
" by would have in possession so many
" years, as were then to come of his rever-
" sion; and if he had a less term in the
" reversion, than the lessee himself had in
" the possession, it should go for the bene-
" fit of the first termor for twenty years,
" who was his grantor; for the term in
" possession is quite gone and drowned in
" the reversion, to the benefit of those
" who have the reversion thereupon, having
" regard to their estate in the reversion,
" and not otherwise: to all which *Fenner*
" agreed. And it appears by the case of
" *Cook and Fountain, suprà,* to be taken
" for clear law, that a lease for ninety-nine
" years might be drowned by his acceptance

" of a lease from the reversioner, even for
" one year."

" But now,(a) whether a lease for years
" in possession may be surrendered, so as
" to be merged in a lease in remainder, be
" the term in remainder greater or less than
" the term in possession, seems to be no
" where settled: indeed my Lord *Coke* says,
that if there be a lease to A. for twenty
" years, remainder to B. for ten years, and
" B. release all his right to A. that here A.
" hath an estate for thirty years, for one
" chattel cannot drown in another, and
years cannot be consumed in years; but
" whether, if A. had granted and surren-
" dered his estate and term to B. it would
" have been merged, does not appear; and
" *Perkins* holds that if a lease for life be of
" lands, the remainder to a stranger for
" years, and the lessee for life surrender his
" estate to him in the remainder for years,
" it cannot take effect as a surrender,
" because an estate for life cannot drown
" in an estate for years; which reason seems
" to prove, that an estate for life cannot
" be surrendered to or merge in a rever-
" sion, if it be only for years: *ideo*
" *quære*."

(a) Co. Litt. 173, b.

Of the Merger of one Term in another, when the more remote Term is a Remainder.

Again there is reason to contend, that an estate for years may merge in another estate for years in remainder. There is no authority to the contrary; and two gentlemen of the most distinguished eminence entertained this opinion, when they were, a few years since, consulted on the point.

Against the application of the learning of merger to estates of this description, the objections which are made, are,

1. That merger is produced either from the meeting of an estate of higher degree, with an estate of inferior degree; or from the meeting of the particular estate, and the immediate reversion in the same person.

2. That equal estates will not drown in each other. These objections appear in a very elaborate opinion now in print.(*b*)

The conclusion from that opinion is, that a term will not merge in a larger term in remainder. Of course, it asserts the broader proposition, that no term can merge in a more remote term, when that term is related to the former term in the quality of a remainder.

Much respect is due to an opinion, which

(*b*) Vin. Abr. Merger.

bears such evident marks of attention to the subject. But as the author of this tract does not admit of all the reasoning which is advanced, or the deduction from all the cases which are cited, it cannot be expected that he should adopt the conclusion. Though the author admits that merger is produced by the meeting of an estate of an higher degree, with an estate of inferior degree, and by the meeting of the particular estate, and the immediate reversion in the same person; he does not subscribe to the distinction which it is the particular object of these propositions to apply to the learning of merger. These propositions assume that as between equal estates related to each other, in the quality of particular estate and remainder, there cannot be any merger, and that all terms are equal to each other. It also assumes, that any particular estate may merge in the immediate reversion, when the particular estate and reversion meet in the same person.

As far as reason and good sense ought to prevail, and technical rules be exploded, it seems to be reasonable, that the assignee of two several and successive terms, one in possession, the other in remainder, should be intitled to hold the possession for both these terms, since from the nature of these interests, there is not any incompatibility between them, and the time of one estate

is quite distinct from the time of the other estate. The same, however, may be said, with equal reason of a term for years, followed by a remainder for life, when the estate for years and the remainder for life meet in the same person; and as the law decides that the term shall merge in the latter case, there does not seem to be any well founded reason against the merger of the term, in the former case.

Now supposing it to be clear, that one term may merge in another; or even admitting the law on this point to be doubtful and unsettled (and that it is at least doubtful and unsettled, if it be not settled agreeable to the opinion adopted in this treatise, cannot be denied,) it will follow that the assignment of several outstanding terms to one person, cannot be adopted in practice with too much caution. The best security arising from outstanding terms, is the early period at which they were created, so as to confer the benefit of the rule, *qui prior est tempore potior est jure.* By merging the old terms, and accelerating the right of possession under the terms of a more recent date, the title is exposed to the danger of being affected by all the incumbrances of each successive owner of the reversion down to the time when the last term was created, without any advantage or security to be derived from the prior terms. This certainly is a serious

consideration on one hand. On the other hand the number of trustees increases the difficulty of alienation on subsequent sales; and the expence of searching for the representations to the different trustees, or of taking administrations of their effects, to complete that representation, may be considerable. But considerable as these expences may be, they cannot, at least in transactions of large value, be put in competition with the risque which is run when the more ancient terms, which are the very ground-work, and best security of the title, are suffered to merge. To avoid all possibility of giving rise to the question, and at the same time with a view to retrench the expence, one plan which is recommended, and may be safely followed, is to have two trustees, and to assign the terms to these trustees, so that one of them may have the first, or elder term, and the other the second term, and each of them take every other term in alternate order, so that every second term may be in one trustee, and every intervening term in the other trustee. By these means, any number of terms, when they are of considerable duration, may be safely assigned to two trustees without any danger of merger, and may be kept continually on foot by successive assignments, by the respective trustees of these terms, to distinct persons; each trustee assigning all the terms in him, to the par-

ticular trustee who is to be substituted in his place. But when any of the terms are nearly expired, there will be some risque in this mode, since the determination of a mesne estate, would occasion the merger of the two estates between which it was interposed, for these terms would become immediate to each other, and be vested in the same person, and then (admitting the doctrine of merger to be applicable to terms for years,) the more immediate estate would be annihilated in the more remote one, and consequently the security and protection arising from the elder of these two terms would be lost.

Another mode of simplifying a title under these terms, is to make an underlease derived out of all the terms, and vest this term in a trustee to attend the inheritances: such new term will operate on each of the terms in point of title, giving the benefit of each of them, as far as that term is vested in the lessor. Such underlease will operate as a lease from the person who, for the time being, can confer the right to the possession, and as a confirmation from the other lessors. The like practice may, with great convenience be observed, when there are different terms in many distinct parcels. The title under all the terms may be consolidated by one demise, by way of underlease.

In either case the several residues of the

terms should be assigned to another trustee, in trust to attend the inheritance; or, (and this is the preferable, and equally safe plan) these terms should be surrendered so as to put an end to their existence.

It frequently occurs in practice that two terms, one immediately expectant on the other, have been assigned to the same trustee. When thi has been done, the error cannot be cured, and no future purchaser can derive any advantage from an assignment of these terms to distinct trustees; since, if the elder term is once merged, no act of the parties can revive it. All they can do, is to create a like term; but such new term must have its commencement in point of title from the date of its creation, and no priority can be derived from this arrangement.

In this place also it may be observed, that as often as there are several terms, in the same lands, and it is perfectly clear, that all of them are subsisting, no danger can arise from surrendering the more immediate of these estates.

And, as a point of practice it may be observed, that, instead of surrendering a term by a formal surrender, even when a surrender is in contemplation, it is sometimes advisable to assign two or more terms to the same trustee, so that if the prior term be of no utility, it may merge by operation of law: as if a term of five hun-

dred years relates to the intirety of the estate, and was created only four months after the term of one thousand years, which comprises only a moiety of the same estate, then instead of surrendering the latter term, and assigning the term of five thousand years in trust, to attend the inheritance, both terms should be assigned to the same trustee, and consequently there will be a merger of the elder term, unless there be, though not known, some interposed estate.

That an interesse termini will neither cause, nor prevent a merger.

A point to be remembered respecting the merger of one term in another, is, that *both terms must be vested in interest*. Therefore a term for years cannot merge in an *interesse termini*, and the interposition of an *interesse termini* will not prevent the operation of merger.(*a*) This was agreed in the case of *Whitchurch v. Whitchurch*.(*b*) And after a merger, the *interesse termini* will commence in possession, or become a term in estate, in most cases exactly the same as if no merger had taken place.(*c*) And when the *inte-*

(*a*) Dyer 112, a. 10 Vin. Abr. 204. pl. 3.
(*b*) 2 P. W. 236.
(*c*) Shep. T. 106. 1 Wood 220. 10 Vin. Abr. 264. pl. 3.

resse termini is to give an estate upon the determination of another estate, already existing, and that estate determines by merger, the right of possession under the *interesse termini* will become immediate, and the *interest* in the term will become a *term in fact.* This may be understood of lands, in which the merger arises from two estates, in another person; for though an *interesse termini* will not prevent the merger of two estates, meeting in the owner of that interest, yet, that the interest would, by the acceptance of the estate in reversion, out of which this interest is to be supplied, and by which it is to be supported, be discharged, cannot be doubted.

Therefore where a man made a lease(*d*) by indenture, for a term of ten years, the term to commence immediately, and afterwards the lessor leased the same land, by indenture, for a term of ten years, to a stranger; the term to commence at the feast of St. *Michael* next ensuing, and then the first lessee purchased the fee-simple, so that his term was merged: it was the opinion of the court, except of *Brown*, that the second lessee might enter after the feast of St. *Michael*, and enjoy his term, &c. consequently the term of ten years merged,

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(*d*) Dyer, 112. a.

notwithstanding the *interesse termini*, and the *interesse termini* conferred a right to the possession earlier than it could have done, without such merger. The doctrine on which implied surrenders, and the principle on which mergers are supposed to take place, afford grounds for the same conclusion. It is the nature of that species of interest, called an *interesse termini*, that it does not pass the immediate reversion, although it is granted by the owner of the reversion. The privity of estate still continues between the termor, in respect of his first term, and the grantor of that term, in respect of his old reversion; and therefore the grantor may distrain, and bring all actions as immediate reversioner. Hence the convenience, and therefore the frequent use, of these reversionary terms, in those counties in which it is the practice to grant leases for years, determinable on lives, and to fill up the lives on every vacancy. These future terms do not pass the immediate reversion. They operate by way of contract only, for a term to commence at a future period.(*a*) On the one hand, there cannot be any merger; because there is not any present and immediate estate, or any implied or virtual sur-

(*a*) See Bacon's Abr. Bro. Leases, 63. 2 P. W. 236. Whitchurch v. Whitchurch.

render, even when the future term is granted to the tenant of a subsisting term, because the time granted by the lease to operate futurely, is not inconsistent with the term already subsisting, as it does not interfere with any part of the time of that term; and on the other hand the reversioner may distrain for the rents reserved on the former lease, and which are generally considerable. The difference is between a lease which gives a future or reversionary term, by way of contract, generally styled a future lease, and a lease which gives part of the reversion by way of immediate estate, generally styled a *concurrent lease;* for a term of the reversion gives all the rights of seignory to the new lessee, and creates a privity between him and the former lessee, as well as between him and the lessor: and the consequence is, that when the two estates meet in the same person, there will be a merger; and while they are in the tenure of distinct persons, the rent reserved on the former term, will belong to the tenant claiming under the second term; so that this term commences immediately in interest, though not in possession; and as it is completing the period of its continuance, at the same time that the term in possession is completing the period of its duration, it receives the denomination of a concurrent lease.

The case of *Swift v. Aires*, (a) may with propriety be introduced into this place. That case is thus stated by *Rolle*. If A. be possessed for years of a portion of tithes; the reversion being to B. in fee; and B. by indenture, made between himself on the one part, and A. and C. on the other part, recite the lease, and confirm it, and then grants the tithes to A. and C., 'habendum to C. after the expiration of the lease for one month, and after to A. in fee, this is a void grant of the fee, for that it *is to commence at a day to come*;(b) for it cannot pass by the intent of the deed, as a reversion, in as much as the deed itself confirms the lease, and grants the fee to the lessee, which if it were a reversion would extinguish the lease after the month expired, and the rent reserved upon the lease would be extinguished, and C. ought to have a month after the expiration of the first term; therefore cannot have it as a reversion immediately.

This case is one of those authorities which shew that there shall not be a merger *against the intention*; or rather that construction of deeds shall be made, as far as circumstances admit, so as to guard against the conse-

(a) 1 Rolle Abr. 828. l. 30.
(b) Essay on Estates, Ch. Freehold.

quences of a merger, contrary to the intention.

So the courts will not imply an estate, when the effect of such implication would be to annihilate an estate, expressly limited by the same instrument.

But when the estate to arise from implication, is compatible with the estate expressly limited, no objection exists against suffering an estate to arise by implication, notwithstanding the estate expressly limited. (*a*)

The remarks which have been made also lead to the observation, of an inaccuracy in practice, frequently committed in assigning the estate of a person, who claims under a present term, and also one or more *reversionary terms* by way of future interest. It is usual to treat the time of enjoyment, under these terms, as *the several residues* of several terms, while, in fact and in strict propriety, the owner has the *residue* of one term, and the *whole* of another term or of several other terms.

Application of the Law on the Merger of Terms.

Taking it for granted, that one term may

(*a*) Rawley v. Holland, 2 Eq. Abr. 753.
Goodright v. Cornish, Salk. 226.
Adams v. Savage, 2 Salk. 679.
Cruise on Uses, 201.

merge in another term, the extent and application of this position must now be examined. It is evident that when A. is tenant for years, reversion to B. for years, and A. *surrenders* or assigns his term to B. the whole of the term formerly in A. will merge or be annihilated. This doctrine is established by *Hughes v. Robotham.* (*b*)

A difference deserving of attention is, that if the estate of A. is derived merely out of the estate of B. as an under-lease, the term originally in B. or those under whom he claims, will not be abridged; for his title is to hold for the residue of the original term; and until that term shall be ended by the effluxion of time, or the same shall otherwise be determined, the owner of the reversion expectant on that term, cannot have any right of entry.

This case depends on its particular circumstances, or circumstances peculiar to itself. Apparently it is the only case of the sort, in which, after the merger of one particular estate in another particular estate, the reversion will comprise all the time of both estates. This case rests wholly on the ground that the reversioner for years, who makes an under-lease, is intitled as well to

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(*b*) Cro. Eliz. 302.

the residue of the whole term as to the residue of the time not comprised in the under-lease, and that the derivative lease made by the termor, has no effect in abridging the duration of his own term. It merely disposes of the right to the immediate possession, or the more immediate enjoyment of the land.

So that if lessee for twenty years, leases for ten years, the first lessee still continues the owner of the residue of the whole term for twenty years; partly in point of seignory, and partly in point of right to the possession, when it shall be vacant. He has not merely the surplus of the twenty years, after deducting ten years from that term; he has the residue of the estate, consisting of a term of twenty years, not in any degree, abridged in duration by the lease he has granted; and the effect in this case is no other than if tenant for his own life, or for the life of another, makes an under-lease, passing a freehold estate, and the second lessee surrenders to his own lessor, or grants his estate; the effect of the grant or surrender is merely to restore the grantee or surrenderee to his former estate, and resolve the time of the under-lease in the time of the estate of the person by whom that lease was granted. It operates merely as a determination of the right of enjoyment, by virtue of the under-lease. That lease did

not abridge the estate of the lessor; it merely affected the right of possession, by transferring to another person, for a particular time, that right of enjoyment to which he himself was intitled. These observations are equally applicable to all cases of merger of a derivative estate, in the estate of the person by whom that estate was granted, when the transaction takes place between these persons, as a surrender in fact, or as a grant operating by way of surrender. But the contrary is the case when the two estates are distinct, and independent of each other; so that the estate in possession is not merely a part of the estate of the reversion, or derived out of the same. Therefore if A. seized in fee leases first to B. for five hundred years, and afterwards to C. for ten years by way of immediate reversion, and C. assigns his term to B., the estate of B. will be merged in the estate of C. and the estate of C. will end or determine with the effluxion of the time, or sooner determination of the term of ten years. Under these circumstances the title of C. as reversioner is to hold only for ten years, and the accession of the term of five hundred years, will not enlarge the estate of C. or give to it any additional time of continuance. The operation of the law is to merge the five hundred years term, to the intent that this term may be completely

annihilated, and to bring the term of ten years into possession. This term of ten years, consequently must cease to exist, when the time limited for its duration shall have elapsed. The difference to be collected from the cases which have been examined, on the subject of the merger of terms for years in each other, is that in the former instance, the term in the reversion does, in point of law, comprize all the time for which it was originally granted, and not merely the time which is not disposed of by the derivative lease, while in the other case the reversionary term is merely for ten years, and that term must cease as soon as the period of its continuance is determined; and the time of its duration must have begun to run; before it can be the cause of its merging another term.

In the cited case of *Hughes v. Robotham*, notice was taken of this very exception to the application of the doctrine of merger. It was said by *Popham* by way of distinction to the doctrine on which he insisted, "If one be lessee for twenty years, and he "let the land for ten years, and he sur- "renders to him that hath the residue of "the term, this is good to convey his in- "terest, but not to drown his estate, but he "shall have the twenty years as before." That the lessor of the second term shall

have his whole term, is perfectly consistent with the opinion already advanced. It is concluded, however, that the term for ten years merges, and that the lessor has all the residue of his term, because, notwithstanding his lease, he continued, as against his own lessor, to be intitled to the land for the residue of the term, and not merely for such time as would continue unexpired after the term granted by his lease; for though his lease gave a right of enjoyment during a particular period, his term, as to the seignory or right of reversionary ownership, continued to be co-extensive with the term; and it is very probable that Lord *Coke*, and on his authority, the author of *Sheppard's Touchstone*, was led to draw the conclusions which are cited from these books, of the extension of a term of twenty years into a term of thirty years, by the union or accession of another term of ten years. It is demonstrable that the union of two actual and vested terms, by means of distinct conveyances, cannot, under any circumstances, give *one estate* (and this is the material point) of an enlarged time of continuance.

Terms which are vested must be *concurrent* terms, and *concurrent terms* will expire *æquis passibus*.

It is therefore clear that when two vested terms, one of ten years and another of the

reversion for twenty years, vest in A. the estate of the owner of these terms will determine at the end of twenty years at farthest. The more immediate term cannot continue beyond the ten years, and the more remote term must end with the expiration of the twenty years: and the original ten years will expire, at the same time, that the lease for twenty years is completing the measure of its duration: therefore, even admitting that the terms remain distinct, Lord *Coke's* conclusion cannot be maintained. But apply it to an actual term for twenty years, and an additional or superadded *interesse termini* of ten years, to commence after the effluxion of the twenty years, or a term of ten years, and such superadded *interesse termini* of twenty years, then the termor will have the right of enjoyment for the additional years.

In regard to *under-leases* and their merger, it is observable, that partly as lord or reversioner, and partly as beneficial owner, the whole term, subject only to the under-lease continues in the reversioner. The surrender of the under-lease merely accelerates the right of possession in the first lessee, by substituting the possession in the place of the seignory or reversion. The merger, too, of a larger term in one of shorter duration, may be accounted for, on the ground, that it is merely a relinquish-

ment of the *tenancy*, or rather ***possession,*** **to** the person who has the immediate **rever-sion** or perhaps *remainder*.

That Estates for Years may merge in Estates of Freehold or Inheritance.

Again, an estate for years may merge in any estate of freehold or inheritance: hence the axiom that *terminus et feodum non pos-sunt constare simul in una eademque persona.* Hence also (*c*) the more general rule, "that "the lesser estate (*d*) merges in the greater." And therefore an estate for years may merge in an estate for the life of the party, or the life of any other person, or in an estate-tail, or in an estate in fee;(*e*) and in those instances in which an estate for years merges, *all collateral qualities an-nexed to that estate;* (*f*) *as to be dispunish-able for waste, will be extinguished;* and the privileges arising from these qualities will not belong to the estate in which the term for years is absorbed.(*g*) Though the term is for a thousand years, and agreeable

(*c*) Rud. of Law and Equity, 191.

(*d*) Ib.

(*e*) Perks. 623.

(*f*) To be introduced in treating of the effect of *Merger*.

(*g*) Lewis Bowles's Case, 11 Rep. 83.

to all calculation from the utmost length of human life, will most certainly continue beyond the death of any person, yet in legal consideration an estate (h) of freehold is of greater extent, and of higher estimation, than a chattel interest, and the chattel interest will merge in the freehold estate. Perhaps this doctrine of the law may be deduced from the dependant state of those who formerly were the tenants of these chattel interests, (i) and from the power which, prior to the statute of 21 Hen. 8. c. 15, the freeholder possessed of defeating these interests by suffering his own title to be questioned, and impeached in a feigned action. From the same consideration, it seems to follow that a termor for years may release, even in cases in which there cannot be any merger, and in which, of consequence, an actual surrender would be ineffectual.

This opinion is reasonable in itself, and perfectly consistent with the nature of our system of tenures; for leases for years operate by way of contract, and all contracts may be released to those on whom they are obligatory. But *an estate of freehold cannot merge in an estate for years.* This is a consequence of that part of the doctrine of

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(h) 3 Lev. 264.

(i) See Essay on Est. Ch. Freehold, Theobald v. Duffoy, 9 Mod. 102.

merger, which requires that the more remote estate shall be as large as, or larger than the estate to be merged; and hence the axiom that frank tenements cannot merge in a chattel. (j) It is almost superfluous to cite cases or authorities, to prove that an estate for years will merge in an estate of freehold; but the following cases illustrate the doctrine. A. leased for years to B. and afterwards leased for years in reversion to C, and afterwards devised the same and other lands to C. for life, to bring up A.'s children. C. entered and took the rent *virtute testamenti*: this is a merger of the lease (k) to C. although he was a trustee of the freehold.

So the estate of tenant for years merged when he became seised of the freehold by occupancy (l) or mere act of law: and yet it might be very injurious to the termor to have the freehold substituted for his term of years.

(j) Lampet's Case, 10 Rep. 48 b. Jenk. Cent.

(k) Leon. 129.

(l) Chamberlain and Ewer's Case, 2 Bulstr. 13. Cited Carter 59.

That Estates, after Possibility of Issue extinct, are, for all the Purposes of Merger, Estates for Life, and may merge in Estates of that or a superior Degree.

It has been said that no merger can be where estates differ only in *quality*, and not in *quantity*. This was an argument advanced in the case of *Bowles and Bertie*, Rolle Rep. 178. The instance given was of a tenancy in tail, after possibility of issue extinct, and a tenancy for life; but the decided cases afford no ground for this distinction. As far as the decisions extend, they furnish an argument for the converse of this proposition, and of course afford a negative to the proposition, that equal estates cannot merge in each other; and therefore though in *Lewis Bowles's* case it was declared that tenant in tail after possibility of issue had a greater privilege and pre-eminence, in respect of the quality of his estate, than tenant for life, he had no greater quantity of estate than that tenant. And after enumerating these qualities of the estates of tenant in tail, after possibility of issue extinct, which are not common, to an estate

for life, the resolution proceeds to distinguish the quantity of his estate, independently of its privileges, from the quality of that estate.

By the execution of the estate mentioned in this case, the merger of the estate-tail after possibility of issue extinct must be understood. (*m*) For all the purposes of merger an estate-tail after possibility of issue extinct is classed among estates for life, and is susceptible of merger as such.

Lewis Bowles's case admits the doctrine, though it is an immediate authority for the point, that an estate of freehold, with the privilege of committing waste merged by its union in an estate-tail, which eventually became an estate-tail after possibility of issue extinct; and the material point was whether, in right of this estate, the widow had the privilege of being exempt from punishment for waste committed. (*n*)

It was agreed in that case that tenant in tail after possibility of issue, hath a greater pre-eminence and privilege in respect of the *quality* of his estate, than tenant for life, but he hath not a *greater quantity* of estate than tenant for life. In respect of the

(*m*) Brooke, Surr. pl. 6, Watkins, 115.

(*n*) Lewis Bowles's Case, 11 Rep.

quality of his estate, it tastes too much of the quality of an estate in tail, out of which it is derived.

But as to the *quantity*, he hath but an estate for life, and therefore, if he maketh a feoffment in fee, it is a forfeiture of his estate. So if fee or tail general descend or remain to tenant in tail after possibility, &c. the fee or estate-tail is executed. And by the statute of Westminster second, he in the reversion shall be received upon his default. And an exchange betwixt tenant for life, and tenant in tail after possibility is good, for their estates are equal.

So where land was given to W. and A. his wife in special tail, remainder to I. N. in tail, the remainder to the right heirs of I. N. The baron died without issue, and A. the feme survived and became tenant in tail after possibility of issue extinct, and took another husband and had issue, and after I. N. died without issue, to whom the feme is heir, and she died, the second husband shall be tenant by the curtesy; for when the remainder in fee came to the feme tenant in tail, after possibility of issue, the freehold was extinct in the fee, and so A. was seised in fee.(*o*)

(*o*) Bro. Estates, pl. 25. Bro. Surrender, p. 6.

That Estates for Life may merge in each other, or in larger Estates.

One estate for life may merge in another estate for life. Even among estates of this denomination, there is a *gradation.* (*a*) Thus the objection that equal estates cannot merge is avoided. (*b*) An estate for the life of another person, more commonly known by the appellation of an estate *pur autre vie,* is as to the tenant himself, accounted of less extent than an estate for his own life.(*c*) Therefore an estate for a man's own life, will not merge in an estate which he has for the life of another person. But an estate for the life of another may merge in an estate which a man has for his own life,(*d*) though both estates are created by the same deed.

When A. has an estate for his own life, and a remainder for the life of another person, then, whether these estates are derived under several limitations to him in the same instrument, or from several limitations in distinct instruments, there will not be any merger of either of these estates. The estate for his

(*a*) Vin Abr. 356, Hurd v. Foy, 2 Roll's Rep. 483. 11 Rep. 81. Perk. s. 226. Shep. Touch. 341.

(*b*) 11 Rep. 83.

(*c*) 1 Inst. 42. a. 11 Rep. 83. Perk. s. 590.

(*d*) 11 Rep. 83. Owen, 38.

own life will not merge in the estate of which he is tenant for the life of another person, because the estate for the life of that person, is less than the estate for his own life; and the estate for the life of the other person, will not merge in the estate for his own life, because the estate for his own life is the larger estate, and first in order of time; and there cannot ever be any merger unless the precedent estate may merge in the more remote estate. The opinion expressed in the fourth resolution of *Lewis Bowles's* case corresponds with the doctrine now advanced. The conclusion drawn in that resolution is, if a lease be made for life, the remainder to the husband and wife in special tail, the husband dieth without issue, now is the wife tenant in tail after possibility of this remainder; and if the tenant for life surrendereth to her, as he may, (for the life of him in remainder is higher than the life of another) now is she tenant in tail after possibility in possession. This point is further illustrated by the case of several limitations by the same instrument to the same person, for distinct estates, one for the life of a stranger, the other for the life of himself, for in that case there may be a merger.

It has been said that if A. is tenant for his own life with remainder to another for

the life of that person, and the remainder-man conveys to A., that the estate in remainder will be merged in the preceding estate. This position confounds all distinctions on the learning on merger. It supposes a merger of the remainder in the particular estate by which it is preceded and by which it is supported. Agreeably to this opinion the remainder merges in the estate in possession, while *the doctrine of merger always and uniformly requires that the estate in possession should be implicated in and absorbed by the estate in reversion or remainder.* It is true that under the particular circumstances of the case which has been noticed, natural reason makes no difference whether it is one estate or the other which is absorbed; since if the estate in possession is the one to have continuance, it is precisely the same, in point of effect, as if the remainder was the prior estate and merged in the more remote one; for under one case as well as the other, A. would have an estate for his life, and for his life only.

By admitting the estate for the life of the party himself to be merged in the estate for the life of another person, this absurdity would arise. The act of merger would in intendment of law have abridged the interest of this person, and given him an estate for the life of another person, instead of an

estate for his own life, while it is acknowledged and clearly settled that an estate for the life of another person is, as to *every man*, of less value, and in legal intendment, of less extent, than an estate for his own life.

The doctrine of merger universally requires that the estate in remainder or reversion shall in a legal acceptation at least be sufficiently large to comprise the estate which is merged; and therefore it is agreed that an estate for life and a remainder for years may continue in the same person unaffected by the doctrine of merger.

With the exception which has been noticed estates for life, appear to be all of the same extent; and therefore it seems perfectly consonant with the rules of law, that an estate for the life of one person should merge in an estate for the life of another person, even when neither of these estates is for the life of him who has the more remote interest, (*a*) viz. the estate in reversion or remainder. Thus, in some cases it may happen, that there is tenant for his own life, remainder or reversion to another person, for the life of a stranger, and it should seem on principle, that the estate for life in possession would, on its vesting in the owner of the

(*a*) Yet see Lewis Bowles's Case, 11 Rep. 77. 3d resolution. And Q. if law.

estate for life, in reversion, or remainder merge in the estate in reversion or remainder. For as to the owner of the estate in reversion, or remainder, that estate, and the estate in possession, are both of the same extent. As neither of the estates is for his own life, each estate is, in point of law, equally valuable to him, and of the same extent; comprising the same relative degree of interest. But when the estate in possession is for the life of him who is tenant of the estate for life in remainder or reversion, and the estate in reversion or remainder, is not for his own life, then it seems there cannot be any merger. This is on the ground that the estate in reversion or remainder is not as large as the estate in possession; and this circumstance, as has been frequently noticed, is essentially necessary to the application of the doctrine of merger to the several estates.

The student, however, should be apprized that there is a passage in Lord *Coke*,(*a*) to the effect, that if a man leaseth to A. during the life of B. remainder to him, during the life of C. if he commit waste, an action of waste shall lie against him. From the context, the reason may be collected to be, because he himself committeth the waste, and doeth the wrong; and therefore shall not

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(*a*) 1 Inst. 299.

excuse himself for his committing of waste in respect he himself hath the remainder. Lord *Coke*, therefore, assumed that one estate for life did not merge in the other. But it does not appear that the point of merger occurred to Lord *Coke*, when he stated these propositions. If the several estates do continue distinct, this may be another difference arising from a *remainder* as distinguished from a *reversion*. And it is felt that the case put by Lord *Coke*, and the third resolution in *Lewis Bowles's* case, favor the doctrine that there cannot be any merger as between *equal* estates.

Whatever may be the law on the merger of one estate for life, in another estate for life, when neither of these estates is for the life of the person who is the owner of the estate in reversion or remainder (being the more remote interest) yet it is generally, perhaps universally allowed, that there will be a merger, when the estate in reversion or remainder is held by the tenant of that estate, for his own life.—This point flows of necessity from the position in *Lewis Bowles's* case, that if the lease be made for the term of another's life, without impeachment of waste, the remainder to himself for his own life, he is *punishable* for waste. The reason

(*a*) 11 Rep. 83.

assigned in the report is, that the first estate is gone, and drowned. That it was gone or drowned, was the consequence of the merger.

This last authority affords two other points deserving of notice; first, the prior estate was affected and annihilated, by the doctrine of merger, notwithstanding that estate, and also the remainder, in which the other estates did merge, were both limited by the *same* instrument; and notwithstanding it was most clearly the intention of the parties, that the same person should have the land for the several times of enjoyment expressed by the different limitations of the respective estates; secondly, that the qualities annexed to an estate of freehold, as well as to an estate for years, which merges, will be extinguished on the annihilation of that estate by merger.

This being the construction on several estates limited by the same deed, for different lives, it is material to consider the mode proper to be observed in practice, to prevent the consequence of merger, when it is the intention of the parties, that the lands should be held and enjoyed for the period of the several lives.

It is agreed, and the case of *Ross*, 5 *Rep*. (*b*) is an authority decisive on this point, that a limitation to a person for the *several lives*

(*b*) Ross's case, Utty Dale's case, supra. 1 Inst 42. a.

of himself, and of another person, gives only one estate, with one undivided time of continuance, and not several and distinct estates. Therefore there cannot be any merger of the time for one life, in the time for another life. This authority then suggests the form of limitation proper to be adopted in those cases in which the intention is to give the right of enjoyment for several lives. And when the intention is, that the privilege of being exempt from waste should be annexed to that estate, only during the life of one of those persons, the clause for exempting the owner from impeachment for waste, may be expressed in apposite terms, corresponding with that intention. It may, in so many words, declare that the exemption from impeachment of waste, or, which is the same in effect, the privilege of committing waste, shall be enjoyed only for one of the lives, or after the death of one of the lives, then for another life; or from a particular period or event, during one or more of the lives; or till a particular period or event: thus limiting and confining the period, as the intention requires that it should be restrained.

Of the efficacy of a provision of this sort there does not exist any well founded ground for doubt. The mode which has been recommended is applicable to those cases only, in which the period of enjoyment for several lives is to be in continuation, without any

interval. The observations assume the intention to be, that there should not be any intervening estate. When there is to be an intervening estate, with several limitations to the same person for several lives, the first for the life of a stranger, another for the life of himself, there cannot be any merger immediately. Eventually one of these estates may merge in another, and the annihilation of that estate, would be contrary to the intention; and the extinguishment of any part of the intended time of enjoyment may be prevented.

It may be done effectually by limiting the estates to A. for the life of C. remainder to B. for life, remainder to A. for the several lives of himself and of C. So that if B. should die in the life-time of C. and of A. then the estate to be limited to A. for the life of C. would merge in the estate limited to A. for the lives of himself and C. In consequence of the merger, the estate for these several lives would be accelerated, and A. would have the full and complete extent of interest intended for him, notwithstanding the merger. So against merger, in any event, provision may be made, by limiting the estate for one of the lives, to a trustee. The other mode is equally free from objection, and displays more accuracy.

From the third resolution in *Lewis*

Bowles's case it may be collected, that in those instances in which several estates for the life of the tenant, meet in him; as an estate for life by express limitation, and an estate-tail after possibility of issue extinct; one estate cannot merge in the other. In that case it was said, "because the wife in the case at "bar, had the estate by limitation of the "party, and the estate which she had in the "remainder of the tenant in tail after possi- "bility was not a larger estate in quantity, "it could not drown the estate for life." The court, however, determined that the wife was intitled to the benefit of being a tenant in tail after possibility of issue extinct; observing that though the wife cannot claim the estate of a tenant in tail, after possibility, yet she may claim the privilege and benefit of it; a strange doctrine, and unnecessary to the decision after the resolution that she held the possession under her estate for life, and not under the estate-tail after possibility.

In this place it is to be remembered that it is in reference to the tenant for the time being, that the term for his own life, and the life of another person, is always used.

An estate which in the tenancy of one man is an estate for his own life, will, on its coming into the tenancy of another person, be an estate *pur autre vie*. Reverse the case, and an estate, which in the

tenancy of one man, will be an estate *pur autre vie*, will on its coming into the tenancy of the person on whose life it is held, be an estate for his own life.

It is possible that a man may have an estate for the life of a stranger, and that another person may have an estate in reversion or remainder, for the life of the former tenant; or the order of their estates may be changed, and the estate in possession may belong to another person, and be held for the life of the reversioner or remainder-man. When this happens, and both estates meet in one person, it may be questioned whether any merger would take place.

No decision has occurred on this point. The greater probability is that the estate in possession will merge. Every requisite for merger seems to concur in this case. At the time when the doctrine of merger is to operate, if it can have any effect at all, the two estates are immediately expectant on each other, and the estate in reversion or remainder is, as to the owner of that estate, as large as or larger than the more remote estate is as to the owner or tenant of that estate. But this is a nice point; especially when the second estate is a remainder and not a reversion. Under these circumstances the estates appear in all respects to be equal.

It has been already noticed, that when an estate is granted to an individual for

several lives by one intire limitation, this is an entire interest with one undivided time of continuance; he has one estate which is of that extent, and not several estates. It follows, and the conclusion has been drawn, that there will not be any merger. When there is an estate for several lives, and another estate merely for one life, and these estates meet in one person, it may be questioned whether the estate in possession will merge. It may be objected that the estate for several lives is larger than the estate for one life. In this objection there is apparently great weight. No authority has occurred, from which the law applicable to this point can be stated. It is likely that, following the primary grounds of the law on merger, the courts would incline to the opinion, that the determinations on merger are sufficiently strong to bring this case within their influence. But the point is surrounded with too many difficulties to admit of any certain conclusion. The argument in favor of merger, is, that this is a step towards the acceleration of the reversion, and alters the privity of tenure.

That one estate for life will or will not merge in another estate for life, when the several owners of these estates join in conveying the same to one person, by one limitation, is deserving of particular attention. For the reasons to be advanced in a

succeeding chapter, it should seem that the right would be to hold for the several lives, and consequently no merger would take place.

Again, any estate for life will merge in any estate-tail: for an estate-tail of any denomination is an estate of inheritance and larger than any estate of mere freehold; and by the accession of an estate for life to an estate-tail, the estate for life will be so completely annihilated, that the fee will come into possession, immediately on the determination of the estate-tail by the death of the tenant in tail without issue, though the tenant for life should be still living. Thus in *scire facias* by the heir of I. S. to execute a fine, under a remainder limited to his ancestor, it appeared that a fine was levied to A. for life, the remainder to I. in tail, the remainder in fee to I. S. (*b*) A. surrendered to I. and I. S. died, and I. died without issue. The plaintiff brought his *scire facias*, as the heir of I. S. to execute the fine, and the tenant pleaded that after the death of I. S., I. entered, whose estate he had, and so the fine was executed:—and *Finch*, contrary to *Thorpe*, held that it was a full surrender, and that thereby the estate of A. was merged in the estate-tail, and

(*b*) Bro. Abr. Surrend. pl. 5.

the estate-tail of I. executed and his wife *dowable*. The case supposes a surrender in fact. In this respect the law on surrender and on merger stand precisely on the same footing; for it appears to be an undeniable position, that when once an estate is *merged*, it cannot be revived in favor of the person, from whom the estate passes *absolutely* into the tenancy of the person by whose estate it is merged.

In another case tenant in dower (*c*) leased her estate to him in remainder *rendering rent*.

And it was adjudged to be a good surrender, and that if the heir in reversion was within age he should be in ward, and should have his age, and in a writ of entry should be supposed in by his ancestor, and not by the feme, and yet the tenant in dower was still alive.

It may be observed that if the lease had been for the life of the reversioner, (*d*) then the lease would have left a reversion in the tenant in dower, and this reversion would have been a mesne estate sufficient to prevent a merger of the estate of the tenant in dower.

So in another action of *scire facias* (*e*)

(*c*) Brooke Surr. pl. 16.
(*d*) Brooke Surr. pl. 17. 1 Inst. 42, a.
(*e*) Brooke Surr. pl. 6.

upon a fine, it appeared by the arguments that where a fine is levied to husband and wife in tail, the remainder to N. in fee, and the husband dies without issue, the feme, being now tenant in tail after possibility of issue extinct, leases her estate [read for the period of her life] to N. who had issue and dies, the issue shall not maintain *scire facias*, to execute the fine, because the lease to N. the ancestor, was a surrender.

From the same deduction it follows that any estate for life (*f*) will merge in the fee.

As a summary of some of the distinctions, these points may be noticed.

A. and B. are successive tenants for their respective lives, A. in possession, B. in reversion.

1. If A. grants to B. the estate of A. merges.

2. If B. grants to A. there is no merger.

3. If A. and B. jointly and by one instrument, grant to a third person,* there is, it should seem, no merger.

(*f*) 1 Inst. 299, b.

(*g*) Wiscot's Case, 3 Rep. 15. Vin. Abr. Merger.

Of the Merger of Estates-tail.

Generally speaking, it is a rule that an estate-tail, (g) while in the tenancy of the tenant in tail, and descendible to the issue inheritable under the intail, as the issue in tail, will not merge.

Again, estates-tail when changed into determinable fees, or into estates-tail, (h) after possibility of issue extinct, may merge. That estates-tail after possibility of issue extinct may merge is already proved.

And in *Hussey's* case, cited 1 Rep. 49. b. the Duke of Suffolk was seized of the advowson of Welbourne in the county of Lincoln in tail, with the reversion to the king; and the duke granted the advowson to the king, his heirs and successors; and afterwards the statute of 24 Hen. 8. c. 21. was passed. By that statute, the estate-tail was barred; and the king granted the advowson to another in fee *generally*; and it was held that the grant was good, for the king had only one fee conjoined, and consolidated in him and not two distinct fees; and in the commentary on this case, which is in Hob. p. 323. it is said that two fee-simples, that many stand in several persons distinct, when they meet in one person cannot do so, but the greater and absolute fee doth swallow up the base and limited fee

(h) See Plow. 560. 2 Bulstr. 105. Sir W. Jones. 32.

So in the *Queen v. Austin* (*i*) the lands of a person attainted of treason, and seized of an estate-tail, with the reversion to the queen were vested in the queen by act of parliament; and it was held that the entail was utterly extinct and determined; and the queen was seised of her old fee-simple executed, and could not be adjudged in of a fee-simple determinable on the tail; for then there would be two fee-simples in the queen, which would be absurd. On the ground of the merger and consequent extinguishment of the estate-tail, or rather that the queen was seised by way of *reverter*, it was held that a lease derived out of the estate-tail was avoided. This conclusion, however, as far as respects the lease, is not consistent with the law of merger, and it is denied in *Needham* and *Poole's* case, Yel. 149. Dyer, note to 115 a.

So in *Symons* and *Cudmore*. (*k*) A person who was tenant in tail with the immediate reversion in fee to himself, levied a fine with proclamations, and it was held that the right of possession under the reversion, was accelerated by the merger of the time of the estate-tail: and it was observed, if it should be otherwise, there should be two fee-sim-

(*i*) Dyer 115. a.
(*k*) 4 Mod. 1.

ples in one and the same person; a qualified fee, determinable on the death of tenant in tail dying without issue, and an absolute fee out of the reversioner, which could not be; and agreeable to *Salkeld's* Rep. the court proceeded on the ground that two fees immediately expectant upon one another could not subsist in the same person, and that the statute of Westminster, having made estates-tail a kind of particular estate, (*l*) they are (when the protection of the statute is gone by a fine,) like all other particular estates, subject to a merger and extinguishment when united with the absolute fee.

So in *Shelburne* and *Biddulph*, tenant in tail (*m*) with the remainder in fee by descent, (see also in *Kinaston v. Clerk*,)(*n*) levied a fine, and it was held that the time of the estates-tail was merged, in the remainder in fee. The consequence was, that the possession depending on the title to the remainder in fee, became chargeable with the leases and covenants for renewal of the ancestor of the remainder-man.

In all these cases, by suffering a common recovery, the tenant in tail might have enlarged his estate-tail into a fee-simple; the

(*l*) See also Kinaston v. Clerk, 2 Atk. 204.
(*m*) 4 Bro. P. Case, 594.
(*n*) 2 Atk. 204.

recovery would have barred the remainder or reversion in fee; and the title under the estate-tail would have continued discharged from the incumbrances affecting the reversion, or remainder in fee. In cases of this description considerable caution is requisite in considering whether a fine should be levied or a recovery suffered.

As a general rule it is best to say that in all cases of this sort, a recovery is intitled to a decided preference. As soon as the fine has been levied, the error, if any can be committed, seems to be complete. A recovery afterwards suffered, unless it be part of the same assurance, by reason of one entire agreement, cannot separate the ownership under the estate-tail, from the ownership under the reversion, or remainder in fee. At the same time it is admitted that when the fine and recovery are parts of the same assurance, the estate-tail will by means of the recovery be enlarged into a fee-simple.

When a tenant in tail who has also the immediate reversion or remainder in fee-simple by *descent*, levies a fine and sells the lands, it is frequently advised on the part of a purchaser, to require a recovery at the seller's expence.

One good effect certainly may arise from the recovery. If in truth there be any intermediate estate between the estate-tail and the reversion or remainder in fee, the

recovery will operate, and will bar the remainder or reversion in fee, and consequently all estates and interests derived out of the same. With this view the recovery is a measure of precaution, and in all instances in which there is any reason to expect a claim of title, under the reversion or remainder, or any doubt exists whether the remainder or reversion belonged to the person, who claimed it, or there is any difficulty in ascertaining the construction of any deed or will on which the title to the reversion or remainder depends; in all these and the like instances, no doubt can be entertained of the security arising from or as a consequence the preference due to a recovery. Under such circumstances a purchaser should by all means take a common recovery as part of the assurance of his title. But he has no right to a recovery at the expence of the seller, when there is *apparently*, a good title under the fine.

A mere suspicion of dormant titles depending on, or affecting the remainder or reversion in fee, will not intitle the purchaser to compel the vendor to defray the expence of a common recovery, or to make the want of a recovery, unless it be in the power of the vendor to procure or to suffer it, an objection to the completion of the purchase. The recovery is a measure of prudence and precaution only, not of ne-

cessity; and if a purchaser requires it to increase his security, he ought to be at the expence of the assurance.

Even although the issue in tail are not barred, the time of the estate-tail will merge, or rather be suspended, subject nevertheless, to the right of the issue. At least this inference may be drawn from *Bacon's Abr.* Ch. Discontinuance. It is there said, if tenant in tail enfeoff the donor, this is not any discontinuance, because the donor hath the immediate estate, and it operates as a *surrender;* and passes no more than it may lawfully pass. *Litt.* § 335. a. 1 Co. 140. are cited; and the case is elucidated by the distinction, that if tenant in tail, remainder in tail, and the tenant in tail, enfeoff him in reversion in fee, this is a discontinuance. 1 Co. 140. Co. Litt. 335. because there is a mesne estate. Kelw. 42. And also that if the donee enfeoff the donor and a *stranger*, this is a discontinuance of the whole land. Co. Litt. 335. a. that is conditionally if the stranger survived, Dy. 12. pl. 53. Cro. Car. 406.

Besides, it seems perfectly consistent with the principles of law, that an estate-tail converted into a base fee, as against all persons except the heirs in tail, should, as against all persons, except these heirs, admit of merger, in the ultimate remainder or reversion, and be absolute as between the

parties, and be voidable by the heirs in tail, when and if they should establish their title as such heirs. Let it be remembered, however, that estates-tail have another peculiarity; for a tenant in tail having the immediate freehold, as such, may make a discontinuance; so that, if he convey by fine, or feoffment, to the prejudice of persons in remainder or reversion, he conveys or gives a fee-simple, depending on a new title, and the former owner has merely a right of action: and though he should obtain this new fee-simple, there would not be any merger, because there are not two estates. There is one estate, and the entire fee-simple; and a right to the remainder or reversion in fee. Also the same person may have several estates-tail, in the same lands, at the same time; for example, an estate to him, and the heirs male of his body, or any other special intail, with a remainder or reversion in tail. and yet both estates may remain separate and distinct.

Thus the larger estate-tail will not absorb or merge the smaller estate-tail. Could merger operate, the line of succession under the estate in tail male would be altered. and this the law will not admit.

A man may also have an estate in tail general, and the *reversion* may be granted to him for an estate in tail male, (which

is an inferior estate) (*a*) for the grant of the reversion will give him a benefit. It will pass the services during the estate in tail male; and thus there may be two distinct estates in the same person, giving the land in one line of succession, and the services in a different line of succession. So that the services will be suspended, when the same person is tenant in tail, under each of the gifts, and be revived when the heir in general in tail, and the heir under the gift in tail male are different persons.

But when one person has an estate-tail, and another person has the remainder in fee, and the remainder-man makes a gift in tail out of the remainder, and the second gift in tail does not embrace a larger class of heirs than the original intail, the gift will be nugatory, and for that reason inoperative and void; though the gift would have been good, if made by a person who had a reversion, as distinguished from a remainder, or had been made even by a person who had a remainder for an estate in general tail, or in tail female or the like, when the former gift was in tail male, or in any special form which did not embrace all the heirs, designated to take under the second gift.

(*a*) Badger v. Lloyd, 1 Lord Raym. 523.

Thus in *Badger v. Lloyd* (a) "upon a "special verdict the case was thus. *John* "*Lloyd*, senior, seised of the lands in "question in fee, conveyed them by lease "and release to the use of himself for "ninety-nine years, if he should so long "live, remainder to *John* his son for ninety-"nine years, if he should so long live, re-"mainder to *Elizabeth*, wife of *John* the son "for her life, remainder to trustees and "their heirs during the lives of the two "*Johns*, for preserving the contingent re-"mainders, remainder to the first, &c. "sons of *John* the younger in tail male, "remainder to *John* the elder in tail male, "remainder to *John* the elder in fee. *John* "the elder had issue, *John* the younger, "*Thomas*, *Paul*, and *Peter*. *John* the elder "made his will, and reciting the settle-"ment aforesaid, devised the said lands "in question after the death of *John* "the younger without issue male to "*Thomas*, and after the death of *Thomas* "without issue male, to *Paul*; and if "*Paul* should die without issue male, and "none of his brothers living, then to *Peter* "and his heirs for ever. And in the will, "there are these words, viz. 'Lastly, my "will and meaning is, that all my estates "in lands whatsoever, shall come and de-"scend unto my name and posterity, as is

(a) 1 Lord Raym. 523.

" before specified, and not to strangers;
" and whichsoever of my sons shall survive
" and live longer than all the rest of his
" brothers, then he to possess and enjoy
" all my estates to him and his heirs for
" ever; yet, if it shall so happen (as I trust
" in God it will not) that none of my sons
" shall have issue male, but daughters,
" then I will that their daughters shall inhe-
" rit my estate among them.' *John* the
" elder died. *John* the younger suffered
" a common recovery to the use of him-
" self for life, remainder to his wife for life,
" remainder to the heirs male of their two
" bodies, remainder to the use of the will
" of *John* the elder, &c." The judgment
applicable to this point is in these terms:

"Objection.' That the estate-tail in *John*
" the elder, will destroy this devise. As
" if A. was tenant for life, remainder to
" B. his son in tail male, remainder to A.
" and the heirs male of his body, remainder
" to A. in fee, A. has issue another son C.
" and devises his remainder, after the death
" of B. without issue to C. his second son
" in tail male. It was objected, that this
" devise could never take effect, and there-
" fore, that it was ill, because the estate-
" tail in the father will descend in the
" same order, and interpose between the
" estate devised by the will, and the devi-
" sees respectively will take the old intail

"by descent, which will exclude the new "estates limited by the will; and the devise "of a remainder, which can never take "effect in possession, is void. So here "because the tail devised by the will, can-"not by any possibility take effect in any "of the sons, because they ought to take "by the old intail as heirs male to *John* "the father, and the devise gives no more "nor otherwise than they take by the intail, "and therefore it is void. The which is "apparent, by the comparison of the de-"scents; for the estate-tail devised by the "will, expires *æquis passibus* with the estate-"tail in *John* the elder; and therefore, if "the fee in *John* the elder, out of which "this devise takes effect, was a remainder, "it would be void. But here, in this case, "it is a reversion; and though such a be-"quest of a remainder would be ill, yet it "will be good of a reversion, though it "could never, by any possibility, take "effect in possession. And this is the ex-"press difference in *Cholmley's* case, 2 Co. "51. a. And the reason is, because tenant "in tail holds of him in the reversion, and "he of the chief lord. If a man makes a "feoffment in fee to the use of himself "for life, remainder to his first son, &c. "in tail, remainder to himself, and the heirs "male of his body, remainder to himself, "and his heirs, he has but a reversion:

"and though the tail devised out of it,
"can never take effect in possession, yet it
"is a good devise of such estate in rever-
"sion; for *John* the brother will hold of
"*Thomas*, and *Thomas* of the chief lord, and
"the lord shall avow upon *Thomas modo et*
"*forma prædicta;* so that it creates a
seignory and tenancy, though it can never
"take effect in possession, and this is a
"sound diversity. But then, supposing
"that this fee in *John* the father had been
"a remainder, and so the devises in the will
"void, yet the lessor of the plaintiff will
"have a good title; for the words of the
"will sufficiently explain the intent of the
"testator, and the limitation will be good."

Let it also be called to mind, that when several estates-tail, and the remainder or reversion in fee, become united in the same person, and the estates-tail are converted into base fees, or are deprived of their quality of descending to the heirs in tail, the times or ownership under the estates-tail, will (with the exceptions noticed under a subsequent division, when several owners of distinct estates join in one and the same conveyance) merge in the remainder or reversion in fee.

When a person having several estates-tail, and the remainder or reversion in fee by descent, levies a fine instead of suffering a recovery, it is expedient in most cases,

that he should in the first place join in a demise creating a term of one thousand years or some other term, in trust for the purchaser or mortgagee. Such term would be a protection from a merger, if any, as the term would be derived out of the several estates, and would continue in right of each estate, notwithstanding its merger.

A question to be examined is, whether one of two estates-tail may merge in another estate-tail, when the line of succession under each intail, is precisely the same, and the reversionary estate is co-extensive with the preceding estate. Unless these circumstances concur, there is every reason to conclude that the estate-tail would not merge. It should seem that it would not merge under any circumstances, for it may be to the prejudice of the issue in tail, especially when the title to one estate-tail is not as good as the title to the other estate-tail. The case of *Crocker v. Kelsey*(a) in *Bridgman*, is material only to shew that an estate-tail may continue, notwithstanding it is determined as to the issue, so as to lose those qualities which confer a title on the issue as heir in tail.

Whether one estate-tail may or may not merge in another, depends in some degree on the authority of *Beaumond's* case, otherwise

(a) Cro. J. 688. Bridg. 29. See also Sir G. Brown's case. 3 Rep. 50. b.

Baker v. Willis.(a) In that case, husband and wife were tenants in special tail, by intireties, with remainder to the husband. The husband alone levied a fine with proclamations, and conveyed to the Earl of *Huntingdon*, in fee. The husband died, leaving issue. The wife entered; and the Earl of *Huntingdon*, reciting that the said *Elizabeth* held the tenements *in tail*, remainder expectant to the right heirs of the earl, ratified, assured and confirmed to the said *Elizabeth* all her estate, right, title, and interest in the said tenements, *habendum* to the said *Elizabeth*, and the *heirs of the body* of her and the said *J. Beaumond* engendered.

It was agreed that the fine of the father was a complete bar to the right of the issue of the husband and wife under the original intail, and that the wife still continued absolute and complete tenant in tail. Hence arose the question, whether under the confirmation she had an estate-tail descendible to her issue in-tail. And by *Coke*,(b) "Judg-"ment ought to be given for the plaintiff. "First, I agreed that the fine with procla-"mations was an absolute bar and discharge "of the estate-tail against *John Beaumond*, "and the heirs of his body, by the express "words of the statute of 32 Hen. 8. and it

(a) 9 Rep. 138. Cro. Car. 476.
(b) Cro. J. 478.

" is *quasi* extinct against him by the fine. Vid.
" Co. lib. 3. fol. 51. Sir George *Brown's*
" case, and 5 H. 7. 30. Secondly—I agreed,
" that when *Elizabeth* entered within the
" five years after the death of *John Beau-*
" *mond*, who levied the fine, she is abso-
" lute tenant in-tail; for the fine *quoad* the
" said *Elizabeth* is absolutely avoided, and
" she is in, as in her former estate, which
" is an absolute estate-tail, and no tail after
" possibility of issue extinct; and if she be
" to sue any real action, she is to name
" herself tenant in-tail, Vid. Dy. 331. and
" 351. Thirdly, that, notwithstanding the
" estate-tail is barred by the fine, yet this
" confirmation, being by indenture, hath
" revived the estate-tail; for although he
" in reversion by reason of the fine may
" enter, and have the land, and the issue
" after the death of the wife is barred, to
" claim it; yet by this confirmation he in
" reversion hath excluded himself against
" his confirmation, to claim it; for he may
" exclude himself of his estate; and as he
" may avoid, so he may confirm, Vid. Coke
lib. 1. *Anne Mayo's* case, 11 H. 7. 28.
" N. B. 98, a.; where tenant in ancient de-
" mesne levies a fine, &c. and although at
" the time of the confirmation he had no-
" thing to confirm, and his words of con-
" firmation will not add to the estate of the
" wife who had an estate-tail; yet by the
" words *habendum* the tenements, there is a

" new estate-tail extracted out of the re-
" version, and settled in *Elizabeth*, so as
" that confirmation is *quasi perficiens et*
" *crescens*; and as the case in *Littleton*,
feme tenant for life, takes a husband, a
" confirmation to the husband and wife,
" *habendum* the land to them, increaseth
" the estate to the husband, *Coke*, lib. 9.
" 139. b. And whereas it was held that
" she had as great an estate before, as she
" had by the confirmation, and therefore
" the confirmation was void; I held that
" although she had an estate-tail, yet she
" takes by the confirmation; for a deed
" shall never be void, when by any intend-
" ment it may be allowed to be good, and
" to have any operation; and she takes it
" for the benefit of the heirs of her and her
" husband's body; and although the heir be
" barred by the fine, yet he is restored to
" the estate-tail by the confirmation; for as
" the fine was an estoppel to the heir to
" claim against the fine; so the indenture
" of confirmation is an estoppel to him in
" reversion, to say, that he shall not hold
" it in tail, and there it is an estoppel
" against an estoppel, which sets the matter
" at large, as it is Coke Lit. 352. b. 12 H.
" 7. 4. And although it was said by my
" brother *Berkeley*, that the Earl of *Hun-*
" *tingdon* hath but a possibility to have it
" after the death of *Elizabeth*, and that he

" hath it but as an occupant, to have and
" enjoy it during the time that *John Beau-*
" *mond* had issue of the said *Elizabeth*, I
" utterly denied, that he hath but a possi-
" bility; for he hath it as in right of his
" reversion, if his confirmation had not
" barred him, and that appears by *Austin's*
" case in *Plowden's* Commentaries, and in
" 38 and 39 Eliz. *Hussey's* case, where an
" estate is barred, or discharged, or dis-
" tinct, as Sir *George Brown's* case, Coke,
" lib. 3. fo. 50. terms it, where he in rever-
" sion shall have it, as in point of reversion,
" and if he hath but a possibility, yet that
" may be well transferred by confirmation
" or release, to him who hath the possession
" of the land, as it is resolved, Coke lib. 4.
" fol. 64. *Fulwood's* case, and lib. 10. fol. 48.
" a. *Lampet's* case; and as it is holden Coke
" lib. 1. *Corbett's* case, that there is no con-
" dition, proviso, or any other title, but
" may by apt words be determined, the one
" way or the other; so here every party
" agreeing the estate-tail shall be revived,
" or at leastwise newly created, and the law
" shall adjudge it according to their inte-
" rest:(*a*) and therefore I was of opinion,
" that judgment should be given for the
" plaintiff. But *Jones and Brampton*, Chief

(*a*) Read " intent."

"Justice, deferred their arguments that day;
"hearing that the parties were about agree-
"ment; and afterwards, by our means, they
"compounded, and Sir *John Beaumond*
"agreed to pay five thousand pounds, and
"the others agreed to assure the estate by
"fine or otherwise, &c. *Et sic materia præ-*
"*dicta sopita fuit*, and no judgment given.
"But *Jones* told me that he was clear of
"opinion that the plaintiff had good title,
"and that the confirmation was good, and
"created a good estate in *Elizabeth* descen-
"dible to her heirs."

To the point now under consideration it is difficult to draw any conclusion. It seems, however, that the wife had the same estate and degree of interest after as before the confirmation. The only effect of the confirmation, if it had any effect, was, to revive the descendible quality of the estate-tail in favor of the heirs in tail. In case the confirming party had had a reversion, then it would be quite consistent that the confirmation should, by way of enlargement, have given a new estate-tail, which modified the fee as derived from the original intail; thus leaving the title to depend on the old intail as changed into a base fee, which in its turn, became descendible to the heirs in tail.

On the Merger of determinable and qualified Fees.

Determinable fees, qualified fees, and conditional fees, will merge in the fee-simple, or in any fee of the same or larger extent; in short, in any fee, not being a fee-tail. Whether it will merge in a fee-tail, cannot be collected from any authority; since on this point, unless the case of *Beaumond*, or *Baker and Willis*, cited in the last division be an authority, the books are silent.

At first view, it may appear that there cannot be any fee after a fee. Certainly it is an axiom of law, that one fee cannot depend on another fee by the grant of the party. But it must be remembered that on the construction of the statute *de donis*, there may at the same time, be several estates-tail, and a remainder or reversion in-fee by the grant of the party; and that a fine with proclamations will dock the intail, and take away the privilege of the issue under this statute; and when the issue are barred, the estate which originally was an intail will become a base or determinable fee. So also a grant by a tenant in tail of all his estate, passes a determinable fee subject to be avoided by his issue. By these means, there may be a base or determinable

fee, (*a*) and also an estate-tail, or several determinable fees, in the same land, at the same time.

These observations shew that the question may arise; and when it arises, there are strong grounds to contend that the base or determinable fee, which is the first in order of time, will merge in the immediate reversion or remainder, when the same is held for an estate, either in fee or in fee-tail. To raise the question, it must of necessity be admitted, that the base or determinable fee, depends in point of title on an estate-tail, and also, that there is a remainder or reversion in fee or in tail, as large as that base or determinable fee, to which the question of merger is to be applied; and under these circumstances, the argument is in favour of a merger.

And in *Goodtitle* on the demise of *Farmer v. Searle et Ux.*(*b*) the fee was devised to the heir at law, subject to an executory devise, and the interest under that executory devise descended to the heir of the testator before his own estate determined; and in that case, as more fully stated in a manuscript report, Mr. *J. Bathurst* said it was certain that where two fees met, the one swallowed up the other. But Justice

(*a*) Machel v. Clarke, 2 Lord Raym. 778.
(*b*) 2 Wils. 29.

Clive had expressed himself in terms which shew that he was of a different opinion: he said he thought there was no merger; that the qualified fee, and absolute fee were distinct. And C. J. *Willes*, in delivering his opinion on that case, declared he could not see there was any merger at all; but he added, if there was a merger, that would not help the plaintiff, because the lesser estate must merge in the greater, one fee in another; and in that case *George*, the deviee, had nothing but what came from, and must descend on the part of the grandmother. On this case it is observable that the heir had not two estates; he had one estate; and beyond that, at the utmost, only a possibility by descent. It seems clear that by the devise he took an estate in fee. It is therefore impossible he could take the fee, as a *vested estate* by descent. Even in a will, two subsisting estates in fee, neither being an estate-tail, cannot be created by express limitation: one must be an alternative or substitute for the other. Of course one must be an executory interest; and when the fee which is devised gives a vested interest, though it be subject to be defeated, no fee can descend: at the utmost nothing more than the right to the fee, on a particular event can descend. However the possibility did descend from the grandmother to the heir, and the heirs of the grandmo-

ther were held intitled by descent in the events which had happened.(*a*) It has been doubted whether the heir takes by purchase or descent, when the fee is devised to him, subject to an executory devise. As the quality of his estate is altered; as he takes a fee with a qualification, instead of a fee absolutely, the better opinion is, that he takes under the will, so that his estate will be descendible from him as the first purchaser.

Scott v. Scott(*b*) is an authority for this conclusion. On this point a more copious discussion will be found in considering to what extent a descent may be affected by merger.

And it may be assumed as a general rule that as often as an estate of inferior degree, will merge in the estate next, in order of precedence, it will merge in any other estate, which would cause the merger of that estate itself; and so on progressively. Thus, an estate for years, or any other estate, not privileged from merger, will merge in an estate of fee-simple; because an estate for years will merge in an estate for life, and an estate for life will merge in an estate in fee. Hence the conclusion drawn by *Viner* from *Wiscott's* case, that where the inheritance comes to the particular estate, whe-

(*a*) See also Vincent v. White, infra.
(*b*) Amb. 383.

ther it is by the act of God, the law, or the party, the particular estate is drowned. In its general tendency, and with a view to several estates held in the same right, this is true of the doctrine of merger; but it must be understood with the qualifications stated in subsequent parts of this essay.(a)

The effect of merger is to annihilate the preceding particular estate in the reversion or remainder, and as far as relates to the right of possession, to bring the more remote estate into the place of the preceding estate. This rule, it is apprehended, called forth Mr. Justice *Bathurst's* observation in *Goodright v. Searle*,(b) that there could be no merger of the grand-mother's estate, which was the largest.

For the same reason an estate for life cannot merge in an estate for years, or an estate for the life of a person himself merge in a more remote estate,(c) which he has for the life of another person, or even for the lives of several persons; and an estate in fee or in tail, cannot merge in an estate for life; or an estate in fee-simple merge in any estate whatever; with the exception that the trust of an estate in fee-simple, may merge, or rather be extinguished in the legal owner-

(a) Vin. Merg. J. (1.)
(b) 2 Wils. 29.
(c) 10 Co.

ship of that estate, as will be shewn in a subsequent page. Now, by a fee-simple must be understood an interest, which will continue for ever; an interest not restrained to any heirs in particular, or subject to any condition or collateral determination, by which it may be qualified, abridged, or defeated.(a) The difference between a fee-simple, and all other fees, is, that the former will continue for ever: so that that, which as to fee-simples is certain, is, as to every other fee, only probable and contingent. In short, a fee-simple is the most ample of all estates. All interests in real property are derived out of this estate, and ultimately, by merger, surrender, or effluxion of time, resolve themselves into it.

The consequence is, that any estate, unless privileged; as an estate-tail, and even that estate, when the right of the issue under the intail ceases, or is defeated, or even suspended; may merge in the fee-simple, (b)

That a fee cannot be mounted on a fee, by way of remainder, gave origin to the learning of executory devises and shifting uses, and, as flowing from this learning, to the rule against perpetuities.

Though a fee after a fee by way of remainder is void; yet one fee may be substi-

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(a) See Ess. on Estates in fee.

(b) Co. Litt. 18. a.

tuted in the place of another fee, in case such first fee should fail of effect, and never vest.

So under the learning of executory devises and springing uses, one fee may be defeated, avoided and determined by another gift limited to take effect within a reasonable time prescribed by the rule against perpetuities.

That rule has, as to the limited period, experienced several changes.

At last the period is fixed to a life or lives in being, twenty-one years and the time of gestation—either at the commencement or the determination; or at the commencement and also at the determination of the period.

With respect, however, to limitations which are to abridge or defeat an estate-tail, the limitation over by way of shifting use or executory devise cannot, as to the estate-tail, be too remote; for the limitation by shifting use or executory devise is collateral to the estate-tail, and may be barred by the tenant in tail when he obtains the immediate freehold or the concurrence of the owner of the immediate freehold; and therefore a case so circumstanced as it is not within the danger, so it is not within the influence of the rule against perpetuities. (a)

(a) Nichols v. Sheffield, 2 Bro. Ch. Cas. 215.

Of Powers and the Fee in the same Person.

At the common law no powers except authorities given by wills of lands which were devisable by custom could be created. These authorities were rather in the nature of powers, than powers. It is sometimes said that the same person cannot have a power and also an estate, but the power will merge in the estate. This proposition is too general, and it is important that this subject, though not strictly belonging to the law of merger, should be examined.

The case of *Goodill v. Brigham*(a) is supposed to have been decided on this ground. In that case a gift to a wife in fee by a will, with a power to dispose of the estate without the controul of her husband, was void as to the power, as being inconsistent with the fee given to her in the first instance; and it was observed by Chief Justice *Eyre*,

1st, That " it was admitted in argument " that this was a devise in fee-simple with " a power superadded. I did not comprehend how that could be. My brother " *Le Blanc* has argued the case very luminously, and satisfactorily, and so as to " convince me that a *power is inconsistent*

(a) 1 Bos. and Puller 192.

" *with such an estate.* If we trace back the
" nature of uses, it will be clear that this
" cannot be considered as a power. Powers
" are the modifications of the uses of that
" estate, which a man has to dispose of;
" and great latitude is allowed in making
" those modifications. If a man employ
" the proper means, he may create all
" kinds of powers that are consistent with,
" and within the extent of, his fee-simple;
" and until his fee-simple is exhausted, I
" know of no power, no distribution, pro-
" vided it do not violate the rules of law,
" which could not be supported: as far as
" that goes the doctrine of powers is very
" intelligible. The power which any one
" creates must be exercised over his own
" estate; but when it has been exercised over
" that estate to the extent of that estate,
" that is, when he has given away the
" whole fee-simple, and the whole use of
" the fee-simple too, it seems to me that
" he is *functus officio.* What remains for
" him to do? All which he does beyond
" that, goes to say in what manner the fee-
" simple shall be enjoyed by the donee,
" and is matter of direction intended by
" the donor to controul all the rules of
" law. When a devisor gives an estate to
" a feme covert, and attempts to relieve
" her from the disability arising from her
" coverture, his estate being exhausted

" the law must controul her enjoyment of " it. It is true that he may modify her " enjoyment of the estate, as far as is within " the use of the estate, as if he make a " conveyance in fee to trustees, and di- " rect that the wife shall have the estate " to her sole and separate use, and make a " subsequent declaration to such uses as " she shall appoint, the uses will wait upon " that declaration, and as soon as any step " has been taken to execute the power, " the uses will receive that direction from " the appointment which he intended that " they should receive. In that case the " appointment under the power will enure " as a limitation of those uses which he had " a right to limit. But the present case " seems quite beyond the scope of a power, " and of all the rules of law which have pre- " vailed with respect to the execution of " powers. The devisor has given a fee- " simple to the wife, to be enjoyed by her " to her sole and separate use: what does " the law say? the law says that a feme " covert cannot take an estate to her sole " and separate use. The devisor should " have taken the necessary steps to carry " his intent into effect: he should either " have devised the estate to trustees with " uses waiting on what he might autho- " rize her to do, or he should not have " given her the whole fee; in either of

" which cases this power might have been
" well executed. This appears to be the
" state of the case on principle; and on
" authority there is nothing which goes to
" establish that where there is a direct
" conveyance of an estate in fee-simple
" any use can be grafted upon it; much
" less a use of this nature, the object of
" which is to enable a feme covert to do
" what by law she is disabled from doing.
" All powers which can be given, must be
" part of the use of the fee-simple; and
" the moment that use is exhausted, there
" can be no such thing as annexing some
" new use, beyond all which the party
" himself had to give. And Mr. Justice
" *Buller* observed, this devise is as explicit
" as possible, and creates in her a complete
" fee-simple. Then the power given is
" inconsistent with the estate, and we can-
" not reduce the latter to an estate for
" life; for we cannot vary the interest
" which the devisor has given. Suppose
" by transposing the clauses we could con-
" strue this to be a devise to such persons
" and uses as *E. Rogers* should appoint;
" and for want of such appointment to
" her, and her heirs. If the devise had
" stood thus, she could have taken nothing
" till her death, or till her appointment.(*a*)

(*a*) This doctrine is not quite accurate. 10 Ves. j. 255.

" Now the devisor clearly intended that
" she should take immediately: we cannot
therefore make this construction without
" doing actual violence to the will. The
" devisor seems to have had two intentions
" which are inconsistent: one was, to give
" an estate in fee to *E. Rogers*; the other,
" to qualify it in such a manner as that
" her husband should have no power over it,
" which last is contrary to the rules of law:
" the court will therefore carry into effect
" the first intention, and reject the other.
" How does this case differ from an attempt
" to create a power of disposing by will
attested by one witness, or to devise an
estate-tail with a restriction on the devi-
see from suffering a recovery? In this,
" as well as in the cases I have put, we can
" only say, the law will not allow of such a
" disposition." And Mr. Justice *Rooke*
added, " when a man gives a fee-simple,
" he shall not be allowed to say, that such
" fee-simple shall not be subject to all the
" restraints which the law imposes upon
" it. The devisor having given a fee-
" simple, he could add nothing to it, and
" consequently the subsequent power is
" void."

The points really decided in this case, when well understood are, 1st, That a person cannot be seized to his own use, when there is not any other purpose to be an-

swered; and 2dly, A man cannot have a power and a fee in the same lands, when he is seized of that fee under a gift or conveyance to him by the rules of the common law. It is necessary to introduce these qualifications, because it is clearly settled by Sir *Edward Clere's* case, (*a*) followed as that case has been by various other determinations, and particularly *Maundrell v. Maundrell*, (*b*) that in a conveyance to uses the same person may have a power of appointment and also a fee.

To guard against mistakes it may be added that when a conveyance is made by A. to B. in fee, to such uses as A. shall appoint, and in default of appointment to the use of A. in fee, A. is seized by means of the statute of uses, and the power and the fee are consistent. It is sometimes said that A. will be seised of his old estate; yet this is only a figurative expression: he has a new seisin or estate with the descendible qualities of his former seisin or estate.

So if A. convey to B. in fee, to such uses as A. shall appoint, and in default of appointment, to the use of A. for life, remainder to B. in fee. The power will be good in this instance, and yet B. is seised by the rules of the common law, under the

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(*a*) 6 Rep. 17.
(*b*) 10 Ves. j. 244.

grant to him, and not by force or means of the use declared in his favor. The *use* declared in his favor, excludes a resulting use. The conveyance operates as to the estate for life under the statute of uses. And therefore as the power is in a conveyance to uses it is an efficient power and well created.

But a form of conveyance which frequently occurs in practice, and which originated in a work of great utility,(*a*) has involved many titles in error and difficulty. For that reason it deserves a few observations. The form now contemplated is that of a conveyance to A. in fee to such uses as A. shall appoint, and in default of appointment to the use of A. in fee. In this form it will be observed A. is the grantee and the only cestui que use. These uses are void in their inception.

Before the statute for transferring uses into possession, A. could not have called for a conveyance to himself. He could not be considered as his own trustee. No use or trust, divided from the seisin or estate, existed. He was the sole and absolute owner, and his beneficial interest resulted from, and was a consequence of his legal estate. The statute of uses is applicable only when there is an use divided from the legal ownership; and therefore the statute

(*a*) Shep. Presid. of Presid.

does not execute uses of this description, when the use or beneficial ownership is in effect embraced in, and conferred by the legal estate. Such indeed is the construction which the statute has received, that it does not operate on the ultimate fee,(*a*) limited to the grantee, after particular estates arising from uses within the scope of the statute. For when the fee is limited to the person who is the grantee of the legal estate, it leaves to him, under the rules of the common law, that portion of the ultimate fee which is not disposed of by means of the uses.

(*a*) Bacon on Uses. Essay on Estates, Intro. Chapter. 2 Vol. 481.

CHAP. XII.

That the several Estates must be held in the same legal Right; or when the Estates are held in different legal Rights, one of them must not be an Accession to the other merely by the Act of Law.

THE rule on merger is, generally, that when two estates, one immediately expectant on the other, meet in the same person, in the same right, the former of these estates shall merge in the latter. There are several qualifications to the general terms of this rule. There are also some exceptions applicable to cases falling under the strict letter of the rule. Of the two estates it has been said, first, that they must come to one and the same person in one and the same right; secondly, that a man cannot have a term for years in his own right and a freehold in *autre droit*, to consist together; thirdly, that a man may have a freehold in his own right and a term in *autre droit*.

These three positions are found in books of the highest authority. They are treated as polar stars; as positions which afford a guide to the distinctions existing between those cases which are, and those which are not, within the exception of the law on the merger of estates. The first position is advanced by Mr. Justice *Blackstone*. (*a*) The terms of that position are not warranted by either of the examples he has given, or either of the cases to which he refers. After laying down the qualification to the rule broadly to be, that the two estates must come to one and the same person in one and the same right, he draws this conclusion, "else if the freehold be in his own right "and the term in right of another (*en autre* "*droit*) there is no merger." Though the rule of qualification is in general terms, the conclusion from it is to those cases only in which the party has the freehold in his own right, and the term in right of another; and the cases stated in support of the conclusion are as confined as the conclusion itself. For the words of the learned commentator are, "therefore if tenant for years dies, and "makes him who hath the reversion in fee "his executor, whereby the term for years

(*a*) 1 Vol. 177.

" vests also in him, the term shall not " merge, for he hath the fee in his own " right, and the term of years in right of the testator, and subject to his debts and lega- " cies. So also if he who hath the rever- " sion in fee, marries the tenant for years " there is no merger, for he hath the inhe- " ritance in his own right, the lease in right " of his wife."

The second and third positions are the language of *Lord Coke*. They were proposed by way of distinction, evidently to shew that, in his opinion, the term will always merge when the freehold is held in *autre droit*, and the term is held by the party in his own right, and that the term will never merge when it is held in *autre droit*, and the freehold is held by the party in his own right; and though Mr. Justice *Blackstone* has, in the most general terms, advanced the opinion that the two estates must come to one and the same person in one and the same right, yet from his conclusion, and from his examples in support of the conclusion, he seems to have agreed to the distinction taken by *Lord Coke*. The passage in question is in *Lord Coke's* commentary on *Littleton*; and it is in these words.(*b*)

" A master of an hospital being a sole

(*b*) 1 Inst. 338 b.

" corporation, by the consent of his bre-
" thren makes a lease for years of part of
" the possessions of the hospital; afterwards
" the lessee for years is made master, the
" term is drowned, for a man cannot have
" a term for years in his own right, and a
" freehold *en autre droit*, to consist toge-
" ther, as if a man lessee for years takes a
" feme lessor to wife. But a man may have
" a freehold in his own right, and a term
" in *autre droit*; and therefore if a man les-
" sor takes the feme lessee to wife, the term
" is not drowned, but he is possessed of the
" term in her right during the coverture.
" So if the lessee makes the lessor executor,
" the term is not drowned."

The exemption from merger has also been considered in this latitude, though not with the same distinctions, by other lawyers of distinguished eminence. In a case in *Salkeld* (c) Lord Chief Justice *Holt* said, if a man hath a term in right of his wife, and *purchases* the reversion, this is no extinguishment, because he hath the term in one right, and the reversion in another. This opinion, as far as it gives any conclusion, affords ground for the terms in which the exemption is expressed by the learned

(c) 1 Salk. 326.

Blackstone: and in 3 *Term Reports*, (*a*) Lord *Kenyon* said generally, without any distinction, nothing is clearer than that a term taken *alieno jure* is not merged in a reversion *acquired suo jure*.

But presumptuous as it may appear to question positions sanctioned by the authority of these great names, the opinion must be hazarded that the law is not fully and clearly expressed by either of these general conclusions.

That the two estates must be held by one and the same person, in one and the same right, in order that the doctrine of merger may be applicable, is, as a general proposition, contrary to several ancient and to some modern cases. Thus according to *Brooke*,(*b*) Surrender, if an executor who has a lease for years from his testator, *purchases* the freehold, the lease is clearly extinct; and *Dyer*, (*c*) also expressly declared that if an *executor* hath a term, and *purchaseth* the fee-simple, the term is determined. In another case, a man had a lease for years as executor, and afterwards purchased the land in *fee*, and *Brooke* (*d*) says the lease was extinct. In another case, a married woman became

(*a*) p. 461.
(*b*) pl. 52.
(*c*) 4 Leon. 37.
(*d*) p. 854. Extinguishment.

intitled to a term as executrix, and the husband held the term in her right, and in right of her character of executrix, he *purchased* the inheritance; (*a*) and it was held that the term was merged so as to be extinct as to the wife if she survived, though in respect of all strangers it should be accounted assetts in his hands.(*b*) And in 4 Leon. 37, *Manwood* declared the law to be that if a woman, termor for years, takes husband who purchases the fee, the term is extinct, for the husband hath *done an act* which destroys the term, namely, the purchase. Now in all these cases the husband was possessed of the term in one right, and became seised of the reversion in fee in another right, and yet the doctrine of merger prevailed. These cases then shew, that the position thus generally advanced by Mr. Justice *Blackstone* cannot be supported by authority.

The position of Lord *Coke* that a man cannot have a term for years in his own right and a freehold in *autre droit*, to consist together, is equally *untenable*. The very example given by his lordship of a man, lessee for years, who takes a feme lessor to wife, has been denied to be law. (*c*) And

(*a*) Cas. 5 Eliz. Mo. 54.

(*b*) Dales, 52. pl. 25. Plow. 420. Broke, Lease 63. Lee's Case, 3 Lev. 16.

(*c*) Litchden v. Winsmore, 1 Roll Abr. 934.

against the point of difference taken by Lord *Coke*, the case of *Platt v. Sleep* (*a*) is a decisive authority.

The point of that case is, that the *descent* of the immediate reversion to a woman does not merge an estate for years vested in her husband in *his own right*. In that case the husband had a term in his own right, and the freehold in right of his wife by *descent*, and yet it was held that these estates might consist together. The resolution was that where the baron had a term for years in his own right, and the inheritance afterwards *descended* to his feme, that coming to him *en autre droit* should not drown and extinguish the term for years which he had and was possessed of in his own right; and that he might well assign over or dispose of the term at his pleasure, notwithstanding the descent of the inheritance to the wife. And all the judges, except *Williams*, who was very strenuous against this doctrine, (*b*) agreed in this point. The judges who dissented from *Williams* said, it was not like *Bracebridge v. Cooke*, (*c*) where the baron had the fee and freehold in his own right, and the term in right of his feme; while the case of *Bracebridge v. Cooke* is an authority that if a

(*a*) Cro. Jac. 276. 1 Bulstr. 118. Godb. 2.
(*b*) 1 Bulstr. 118.
(*c*) Plow. 418.

husband who has the reversion in fee, *afterwards* becomes intitled to a term in right of his wife, the same shall not merge.

From the case of *Platt and Sleep*, *Jenkins* (*a*) in his Centuries deduces these distinctions: "A woman has a lease for years; "she takes a husband who is seised of the "reversion in fee, the lease may survive to "the woman. A husband has a lease for "years, and the wife *purchases* the fee, or "the wife before *marriage has the reversion*; "this extinguishes the lease, but not so "if the fee *descends* to the wife after mar-"riage. He refers to the maxims *volenti* "*non fit injuriâ*, *qui libet potest renunciare* "*juri pro se introducto*."

All these positions are correct except that which applies to the wife, who before marriage has the reversion. That proposition is contrary to the current of authorities, and no case occurs which supports the proposition that the lease shall merge when an "husband has a lease for years and the "wife *purchases* the fee." This latter proposition, if law, may be reconciled by considering that the wife cannot purchase with effect without her husband's concurrence; that his concurrence is an act done by him amounting to a waiver of the term; in effect, to an

(*a*) Jenk. 73. Hob. 3.

agreement to give up the term, and to take the freehold in right of his wife. This, however, should be treated as a doubtful point.

So Lord *Coke* threw out a doubt whether a term in a husband would not merge in the inheritance of his wife, when he became tenant by the curtesy initiate, although it would not merge while he and his wife had only a seisin in right of his wife.(*a*)

The case of the lessee under a hospital becoming master of the hospital is still unanswered. The point of that case is equally applicable to any person who is lessee under the parson of a living, with the concurrence of patron and ordinary, and afterwards during the term becomes parson of the church. The instance of the parson was urged in the case of *Bracebridge v. Cook.* (*b*) It was said by counsel that if a parson, patron, and ordinary, make a lease for years of the glebe land of the parsonage, and after the parson dies, and the lessee for years is made parson, and after he dies, that his executors shall not have the residue of the said term which is to come. The reason they assigned, was that the term was extinct by the frank-tenement of the land, which the parson had in him. *Cataline* denied this

(*a*) 1 Bustr. 118.
(*b*) Plowd. 418.

opinion to be law. He said the parson had the term in his own right, and in capacity of his natural body, and the inheritance as parson, which was another capacity, and that therefore the term should not be extinguished; but some at the bar said he had both in *his own right* and *to his own use*, and therefore it was reason that it should be extinguished, notwithstanding he had it in several capacities, and that it was not like where the termor had the term of years as executor of the lessee, for that there if he died the term should be revived.

On the point of lessee becoming parson, the books afford a great contrariety of opinion. The history of these opinions is traced by *Viner* in his Abridgment,(a) who sums up the same in these words: 3 Le. 111. Trin. 26 Eliz. contra, that the term is extinct, although he had the term in his own right, and the freehold in the right of the church, and cited 1 Roll R. 247. Trin. 12 Jac. that by the best opinion it is an extinguishment, and that it was taken in Sir *Francis Fleming's* case, Lane 101. Hil. 8 Jac. contra, that it does not extinguish his term; per *Bromley*, J.—But see *Winch* 120 *contra*, that it was a surrender, cites *Rudd's* case. So is *Hutt.* 105. in S. C. also Sir *A. Capel's*

(a) 15 Vol. 362. pl. 3, note.

case. So Jenk. 200, in pl. 18, that the lease is extinct. So of a master of an hospital, *ibid;* but if a lease for years be made to A. *one of the commonalty of London,* and afterwards he becomes mayor, this lease is not extinct; and so of a *Dean* and *Chapter, ibid.*

It is rather difficult to refer the cases to any distinct ground, or discover their principle. It is sufficient for the purpose to contend that the determinations only prove that, in those particular instances, the term did merge, notwithstanding the term and the freehold were held in different rights; and that these cases by no means establish a *general* rule that a term in a man's own right is inconsistent with a freehold in *autre droit.*

Though these positions may be law they do not meet or answer the case under consideration; since the party clearly had the term in his own right, and afterwards acquired the freehold in his corporate capacity.

The solution, from the nature of a term, namely, that it depends on contract, and that the subsequent acceptance, is, in fact, a purchase of the freehold, so that the ownership of the term is included in, and conferred by the freehold, and that the law *presumes* an extinguishment, especially as no other person is concerned in interest, affords no satisfactory line of distinction, since every case

of a husband who has a freehold, and marries a woman who has a prior term in the same land, ought to be, whilst it is not governed by the same reason.

It is to be remembered, that a sole corporation cannot take a term in its corporate capacity; and it follows, as a consequence, that it must take the term in its natural capacity, though it was intended, that the parson should have the term in right of his corporate functions. The law in this instance giving effect to the intent, as far as it can be accomplished, and applying the doctrine of *cy pres*, allows the person, who represents the sole corporation to take in his individual capacity; consequently, he takes the term in his own right, and the term will undoubtedly merge in a reversion or remainder in fee, *afterwards granted* to him as an individual. In effect, he then takes both estates in his own right, and therefore these examples do not fall within the authorities which are under discussion.

And though it be true, that a man may have a freehold in his own right, and a term in *autre droit*, yet the position must not be received as a branch of a distinction that a man cannot have a term for years in his own right, and a freehold in *autre droit* to consist together; and that he may have a freehold in his own right, and a term in *autre*

droit. Even as a substantive position it must not be undersood in the utmost latitude of its import. It is not true that a term *cannot* merge, merely because it is held in *autre droit*, and that the freehold is held by the owner of that term in his own right. A term of this description is not exempt from the doctrine of merger. On the one hand, a term held in *autre droit* will not *always* merge, when the term and the freehold meet in the same person: on the other hand, it will not *always be* protected from merger.

That it will merge, or be exempted from merger, will depend on circumstances.

From a collective view of all the cases, the distinction really established by them is not generally, that there will not be any merger, because the two estates are held in different rights, or because the freehold is held by the owner of the term in his own right, and the term in *autre droit*. It is only that the accession of one estate to another,(a) merely, by the *act of law*, as by marriage, by descent,(b) by executorship, intestacy, &c. will not occasion a merger of one estate in the other, when the two estates are held in different rights. While a descent

(a) Plow. Com. 418. 4 Leon. 37.
(b) Lee's case, 3 Leo. 110.

of the inheritance will merge a term, which a person has in his own right at law, though he be a trustee of that term.(*a*)

And in a case noticed in *Leonard*,(*b*) it was agreed that if a feme termor *marry* him in remainder, the term continued, for that it was the *act at law*, which cast the term on the husband; and in *Bracebridge v. Cook*(*c*) the husband was the lessor, and by mesne assignments the tenement became vested in two persons jointly, and one of these persons intermarried with the lessor, and it was held that the *joint-tenancy* was not severed or suspended, and that on the death of the wife, that term survived to her companion in the joint-tenancy; consequently it did not merge. On this case two observations arise. The right which the husband acquires in the term of his wife does not merely, by force of the marriage, sever or suspend a *joint-tenancy*;(*d*) and in the particular case under consideration, the husband was the owner of the freehold before his marriage, and consequently, the term was by *act of law* an accession to his freehold. Therefore he had not done any act which amounted to an alienation or virtual

(*a*) Lee's case, 3 Leo. 110.
(*b*) 4 Lev. 37.
(*c*) Plow. 418.
(*d*) Ibid.

surrender of a term; while an act is done by a man who, after he has a term in right of his wife, *purchases* the freehold, and thereby virtually declares that he means to be the owner of the freehold, and to renounce the term.

In *Bracebridge v. Cook*(a) the husband made a lease for years, the lessee granted the term to the wife of the lessor and a stranger, and the husband and wife died, and the stranger survived. It was adjudged that he should have the intirety of the lands for the residue of the term by survivorship. One of the points made in this case was, whether or no the immediate freehold and inheritance which the husband had, should merge the term which the wife had in the moiety, and so dissolve the jointure between the wife and the stranger.

And as to this point it was said, the case was no other than this: if the lessor who had the fee-simple, married with a woman his lessee for years; or if the husband made a lease for years, and the lessee granted his estate to the wife of the lessor, whether this should extinguish the lease for years or not; for if it should, the moiety of the lease, in that case, was extinguished and merged by the immediate inheritance which the husband had in the land. And the

(a) Plow. 417.

court held the law to be, that the immediate estate of inheritance, which the husband in that case had, should not merge or extinguish the moiety of the term which the wife had; because he had the inheritance in his own right, and the term in right of his wife; in which case the freehold and inheritance of the husband, wherein the wife had nothing, should not merge the term of the wife. For, as it was observed, the *law, which carried in itself reason and equity, would not do prejudice to another;* and in that case the wife was *other than the* person who had the inheritance; and the marriage of husband and wife was a laudable thing, for which reason the law would not prejudice the wife in her chattels real; nevertheless that the husband might have given away the wife's term by an express act, as if he had made a feoffment of the land, or a new lease or the like; but forasmuch as he had not done this or any thing else with the land, and had made no disposition at all of it, but had left it to the judgment of law, the law would preserve the estate of the wife, which estate, as to her, was disjoined from the freehold and the fee-simple. And to obviate the objection drawn from the law on the suspension of rents, when the rent comes to the person liable to pay the same, it was said by the court, that which was suspended was not *in esse* for the time; and that which

was not *in esse* could not be in jointure, for the time of its non-existence; but that in this case, the land was in jointure and was always *in esse*, and could not be in suspense or want existence, but that here were divers times in the land, viz. a lease for seventy years, and the husband after that had another time in the land, viz. a time infinite, which was a fee-simple, which time infinite should merge any other lesser time(a) which the husband had singly in the land in his own right, as a time for years or for life, but that here the lesser time was not in him, singly, but it was in his wife and *Anticle*, the stranger, and he had nothing in that lesser time but by reason of his wife, and then his greater time, which was infinite, should not merge the lesser time which his wife and *Anticle* had, but it should continue for the benefit of the wife, and the preservation of her interest: so that there was no suspension of time, but there was first one time, viz. seventy years in the wife and *Anticle*, and afterwards another distinct time, in the husband, viz. a time infinite, commencing after the first time which should not drown the first time, but the same should continue by good reason for the benefit of the wife and *Anticle*, *inasmuch*

(a) Davis, 4, b.

as the several times were to several purposes, and tended to several benefits.

And in the cited case of *Platt v. Sleep*(a) the reversion in fee, expectant on a term for years, *descended* to a woman whose husband was possessed of a term for years in his own right; and yet it was held, that the term continued, and was not merged: so that this case proves, that there shall not be a merger on the accession of the fee to the term, when the fee comes to the termor by *act of law*, and the fee and the term are held in different rights. And in *Owen's* case,(b) it was agreed, if a feme sole executrix of a term marry him in the reversion and dies, the term is not drowned, but the administration of it shall be committed, otherwise perhaps if she had purchased the reversion.

In *all the cases now under consideration, one of these estates was an accession to the other, by the mere act of law;* and no distinction was made whether the reversion or remainder was an accession to the preceding particular estate, or the preceding particular estate was an accession to the reversion or remainder in fee. In *Platt v. Sleep* the *reversion acceded* to the term, and in *Brace-*

(a) Cro. Jac. 275.
(b) Hetley 36.

bridge v. Cook the term was an accession to the reversion, and in these and all the similar cases, the exemption from merger was uniformly allowed, as the consequence that the two estates were held in different rights, and these rights as distinguished from trusts, (*a*) were recognized and allowed by the law; and that one of these estates was an accession to the other, merely by the act of law. The distinction which has been offered to the attention of the reader, is perfectly consistent with the instances insisted on by *Blackstone* as examples of the application of his qualification to the rule. After observing that the estates must come to one and the same person, in one and the same right, the learned commentator adds, "else "if the freehold be in his own right, and "he has a term in right of another (in *autre* "*droit*) there is no merger. Therefore," he continues to observe, "if tenant for years "dies, and makes him who hath the rever-"sion in fee his executor, whereby the term "for years vests also in him, the term *shall* "*not* merge. So also, if he who hath the "reversion in fee marries the tenant for "years, he hath the inheritance in his own "right, the lease in right of his wife." In all these cases one estate was an accession

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(*a*) Lee's case, 3 Leo. 110.

to an estate already vested in the person who became intitled as husband or executor.

The reason for this distinction is accounted for on the first principles of justice; on the equity of law, not on the equity of courts of conscience; on the hardship that the estate of a testator or of a husband or of a wife, should be annihilated, and the right of creditors, legatees, husbands or wives, defeated by the *mere act of law* without any act done by the parties. It is to these grounds, that several judges of the first eminence have ascribed the reason, and for these reasons they have allowed of the exemption. In *Bracebridge v. Cook* the term did not merge, because, as it was said, *the law* which carried in itself reason and equity, would not do prejudice to another, as marriage was a laudable thing, the law would not prejudice the wife in her chattels real, &c.

And in the instance cited from *Salkeld*. Lord Chief Justice *Holt* said, the difference of the rights hindered an extinguishment, because *a third person was concerned*, and might be prejudiced, which could not be *by act of law*.

It must be acknowledged that Lord Chief Justice *Holt* applied these reasons, even to the case of a person who was possessed of a term in *autre droit*, and *purchased* the reversion; but though the reason of the exemp-

tion ceases when the party *does any* act to acquire one estate, after he has the other, yet, from the cases which have been cited, it is clear that the reason is to be urged when one estate is an accession to the other, merely by *the act of law*; and it is not difficult to shew that the reasons given in *Bracebridge v. Cook* are susceptible of this sense, and are properly understood with this qualification.

Lichden and Windsmore(a) carries the exemption from merger to a greater length. According to that case, if a man seised of an estate for life, in right of his wife, takes an assignment of a term on which the freehold of his wife is expectant, the term will not merge; and yet in this case he has the term in his own right, and the freehold in right of another, and one of these estates is an accession to the other by his *own* act. In this case there was a lease for years, the reversion to A. a feme covert, and the lessee granted his estate to the baron, and it was held that the term was not extinct, because the baron had the estates in several rights; for that the frank-tenement was in the wife, and the baron only seised in her right, and yet the term might have been surrendered to the husband.

(a) 2 Roll. 279.

The case last cited, seems an authority to prove a point which may be inferred from other cases, that when a person has several estates in different rights, neither of these estates shall merge, unless his power of alienation extends to one estate, as well as the other. The cases have carried the point still one degree further. It has even been held, that if a woman leases for life, and having the reversion in fee takes husband, and her husband purchases the lease for life, that the lease for life shall not merge though the husband in right of his wife, is seised of the reversion in fee, which is immediate to the estate for life, of which he is seised in his own right.

A view has now been taken of the exception and the grounds on which it is allowed. It appears to have been allowed on reasons of equity, or rather justice; on the broad principle that as merger is the annihilation of one estate in another, by the conclusion of law, the law will not draw this conclusion to the prejudice of creditors, legatees, husbands, or wives, when the mere act of law is the cause that one estate is an accession to the other; and this accession of estate would occasion the merger of one of these estates in the other, unless the law interposed to qualify the operation of its own act by introducing an exception, which denied the application of merger.

By the accession of one estate to the other, it must be universally understood that the person in whom the two estates meet is the owner of one of these estates, and that *afterwards* another estate devolves to him *by the act of law*, as by descent to him, or in right of a wife, or of a testator or intestate. It is under these circumstances, and these circumstances only, that the law allows of the exemption from merger.

For as often as a person is the owner of an estate in right of a wife (in that case not being a freehold) or in right of a testator, and he *purchases* the immediate reversion or remainder, then with the concurrence of those other requisites which are essential to the operation of the doctrine of merger, the estate held in another right will merge.

Therefore if a husband possessed in right of his wife, purchases the reversion or remainder; or,

Secondly, if an executor has a term in right of his testator, and purchases the reversion; in both these instances the term will merge; and yet he has the term in one right and the fee in another right; but the reason of these decisions, clearly depends on the circumstance that the reversion or remainder was acquired by the party by his

own act. Thus it was held(*a*) that, if an executor hath a term, and purchaseth the fee-simple, the term is determined. A woman termor of years takes husband, who purchases the fee, the term is extinct, for the husband has done an act, which destroys the term, *scil.* the purchase. But if a woman being a termor, marry with him in the remainder, the term continueth, for here it is not the act of the wife, but the act of the law, which gives the term to the husband.

A case in *Brooke*(*b*) affords ground for the same distinction; and it was said, that if a termor makes the lessor his executor and dies, this is no surrender, for he had the term to another use; but that, if an executor who has a lease for years from his testator, purchases the freehold, the lease is clearly extinct.

And, in another case (pl. 54.) *Brooke* says a man had a lease for years as executor, and afterwards purchased the land *in fee*, the lease is extinct.

And in another case the wife became intitled to the term, as executrix, and the husband held the same in right of her executorship, and yet it was held that his purchase of the reversion occasioned a merger

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(*a*) 4 Leon. 38.
(*b*) Bro. Surr. 52.

of the term. These circumstances occurred, and this decision was pronounced in Moor 54. In this case it was held by all the justices, that, if an executrix have a term, and she marry, and the husband purchase the reversion, the term is extinct as to the wife if she survive; but in respect of all strangers it shall be assets in his hands.

In each of these cases, the party who held the estate in *autre droit* had the complete ownership of that estate; at least the complete right of aliening the same; and as he might have disposed of the estate, and has voluntarily acquired the reversion or remainder, the law admits of its general conclusion, and the application of those rules of which merger is the necessary consequence.

This perhaps is presenting the reason of merger in a new light, and assigning reasons never yet urged, to account for the operation of the law of merger in these cases. However these reasons may be approved, they are founded in the general principle, that unless the owner of the preceding estate has the right of aliening that estate, the same cannot merge in the reversion or remainder, by whatever means the reversion or remainder is acquired. The application of this doctrine between husband and wife, when the husband is seised of an estate of freehold in right of his wife, is too obvious to require a long

discussion to enforce it. That the estate of freehold of the wife cannot merge, is a consequence necessarily flowing from the absence of a right in the husband to alien that estate.(a) It is a general rule, that the husband cannot, in virtue of his marital right, dispose of his wife's freehold, so as to preclude her from resuming her estate on his death. It would be absurd then in the law to suffer the husband to defeat the wife of her estate, by indirect means, when it denies to him the privilege of doing it by alienation in express terms. Indeed, considering merger as it really is, the conclusion of law from a supposed intention that two estates should not exist distinctly, how can the law infer this intention, or how could it admit of the merger of the wife's freehold, when one of the great objects of the law is to preserve the freehold to the wife?

It remains to be considered as between whom this exemption is allowed, and what interests, not conferring the beneficial ownership, are, with reference to the law of merger, said to be held in *autre droit*.

From the cases already cited, it appears that the exemption applies;

1st. As between husband and wife.

2d. As between executors and admini-

(a) Stephens v. Bretridge, 3 Lev. 36.

strators, having an estate in their own right and another in right of their testator or intestate.

It also applies in some degree and without any possibility of merger.

3d. As between persons who form a part of a corporation aggregate of many, and who have estates in their individual capacity, at the same time that the corporation of which they are a constituent part, has an estate in its corporate capacity.

It also seems to apply,

4th. Between persons intitled under an intail, and who have the fee expectant upon that estate. And,

5th. Between persons who have an instantaneous or temporary seisin to serve uses to be raised out of the estate conveyed to them, and also an estate in their own right.

But it does not apply, as,

1st. Between trustees and *cestuis que* trust.(*a*)

2d. Nor as between joint-tenants when the reversion comes to one of them by descent. (*b*)

Nor when the reversion is limited by any

(*a*) Lee's case, 2 Leon. 110. See Leon. 129. Finch Rep. 3 Leon. 6. 2 Atk. 72. Viliers v. Viliers.

(*b*) Wiscot's case, 2 Rep. 60.

other deed, &c. than that which creates the joint-tenancy.(a)

And it is doubtful whether it applies as between,

1st. Parsons who have a term in their own right, and also the *parsonage* in right of their church and in their capacity of parsons. Or,

2d. Prebendaries who have an estate in the revenues and lands of the prebend under a grant from the prebendary, and also the advowson of the prebend as their inheritance, or the incumbency of the prebend in the character of prebendary;(b) and note, there might be a release or surrender in the time of vacancy. See Co. Litt. Index Parson, Patron.

First, Sufficient to shew the leading grounds of the exemption as between husband and wife, will be collected from the cases already introduced, and the observations already made. In addition to these cases, and these observations, it is necessary to consider the right of the husband to lands held for a term of years in right of his wife. During the coverture he has a general and unlimited right of disposing of the lands, for all or any part of the term, but as against his wife, if she survives he cannot charge the land, or pass the

(a) Wiscot's case, 2 Rep. 60. 1 Inst. 184.

(b) See Vin. Merger.

same by his will The right of the wife after the decease of her husband will take place of any charge he has created, or any testamentary disposition he has made.(*a*) If the husband survive the wife, the term will vest in him absolutely in his own right, without obtaining letters of administration; and it cannot be doubted but that immediately after the death of his wife, the term will cease to be privileged from the application of the law on merger, and will be affected by all the consequences of this conclusion of the law, notwithstanding the term held in right of the wife, was an accession to the estate which the husband held in his own right. From the instant the wife dies, the husband ceases to hold in right of his wife, and the reason of the exemption of her estate from merger ceases in the same instant, and *cessante ratione cessat ipsa lex*.(*b*)

But if the wife survive her husband, then the term, or so much of the time thereof, as is vested in him at his death, will again become the absolute property of the wife, exempt from all charges of the husband, as distinguished from under-leases, &c. and all dispositions by his will, and the application of the doctrine of merger; as far at least as

(*a*) Plow. 419.
(*b*) Cro. Eliz. 827. Peck v. Channel, 8 Vin. 519.

this estate is intitled to the exemption, from the circumstance that the estate was an accession by marriage, to an estate previously vested in her husband, or an estate which *descended to him.*

In examining the doctrine of merger of estates, held by husbands in right of their wives, all the cases which have been introduced have been applied to two estates, when one of them belongs to the husband himself in his own right and the other is held in right of his wife: and the exemption perhaps is confined to instances of this sort. When the wife has one estate, and then purchases, the better opinion seems to be that the doctrine of merger is to be applied to the estates absolutely, if the first estate was for years; voidably if it were of freehold for life; Jenk. 73. is sometimes urged as an authority for this opinion; but in that book there is nothing which is decisive on this point. The language of the book is rather applicable to other distinctions which have been already examined. At the same time one of the points insisted on in that book will support the general position that if the wife with the consent of her husband, possessed of a term in her right, purchases the reversion, the term will merge, for it is said that if an husband has a lease for years, and the wife purchases the fee, this extinguishes the lease. Now if it will extin-

guish the term of the husband which he holds in his own right, it is a consequence necessarily arising from the reason of merger, and from the exceptions to the application of that doctrine, that the term should merge when the husband holds the same in right of his wife, and she purchases the reversion.

And perhaps the term would not revive even though she disagreed to the purchase. It must also be remembered that the general rule of merger is, that one of two estates immediately expectant on each other, shall merge when both estates are held in the same right; and the exceptions to the rule are in favor of those instances only in which one of two estates is an accession to the other by the act of law, and third persons would be prejudiced by the consequence of merger. When the husband has a term in his own right, or in right of his wife, and his wife purchases the reversion with his consent, the privilege from merger, if any exists, must be allowed in favor of the husband, but if it is not allowed to exist in favor of the husband, when he has the term in his own right, there cannot be any reason for allowing the same in those instances in which the husband has the term in right of his wife.

A case of greater difficulty may be proposed. A husband has a term for years in right of his wife, and the reversion in fee

descends to his wife. On this case it is difficult to anticipate the judgment of the courts of justice, and no case has occurred which decides the point.

By the case of *Platt v. Sleep* it is determined *that the descent to the wife shall not merge the term which a husband has in his own right.* That case must have been decided upon the ground that the descent was the mere act of law, and that the act of law will not do any injury. A descent of the fee to the wife of a man possessed of a term in her right, is not precisely within the reason of that case. It is true the right of the husband under the term of his wife will be affected by merger, but then in truth the term is the property of the wife til the husband has disposed of it. It is probable, however, that when this case shall come for decision before the courts of justice, they will incline to favor the right of the husband. The principles of the doctrine of merger, and of the exceptions allowed to that doctrine, appear sufficiently extensive in favor of the legal rights of third persons to justify this decision; but till the point shall have been decided it is difficult, indeed impossible, to form any certain conclusion.

From the observations, which have been detailed, these points of distinction may be summed up:

1st, If a husband who is tenant for years

intermarries with a woman who at that time has the reversion, or to whom the reversion descends after the intermarriage, the term will not merge, because in one case the right of the husband in the reversion of his wife, and in the other case, the *descent*, is an act of law.

2dly, But if a husband, tenant for years in right of his wife, *purchase* the immediate reversion, the term will be annihilated; for the purchase was the *express* act of the husband, and amounts to a disposition of the term. And if a feme who has a term for years as executrix, intermarry with a person who after the intermarriage becomes intitled by *purchase* to the immediate reversion; or if a person who has a term as executor, do himself purchase the immediate reversion; the term will, in either case, be merged.

When the husband has an estate of freehold in his own right, and the fee in right of his wife, the freehold will not merge; and therefore where a woman seised of land in fee, leased the same to a stranger for life, and took a husband, and the lessee granted his estate (*a*) to the husband, this was no surrender, and yet the husband was seised of the reversion in fee, which was immediate unto the estate of the lessee, viz. in right

(*a*) Perk. § 622.

of his wife and not in his own right. And it seems to be a general rule that,

The Freehold of the Wife will not in any case merge in the Freehold of the Husband.

This may be considered as a clear point.(*a*) The wife cannot part with her freehold without some act of record; and even a conveyance by her without some act of *record*, would be voidable. To what purpose then should the law give its conclusion of merger as between husband and wife?

The merger of terms for years depends on different grounds. Of these interests the husband alone has a complete right of disposition; therefore he is the complete owner of these estates for all the purposes of alienation; and it is reasonable that on his becoming a purchaser of the reversion, the ownership under the terms, should be considered as abandoned, and these terms treated as merged. All the law has determined on the subject of the merger of terms is, that the mere *act of marriage*, or the mere act of law, shall not of itself be a merger of an estate, when the term and the reversion are held in different rights, and the husband

(*a*) Stephens v. Bretridge, 1 Lev. 36. Perk. § 612—622.

refrains from doing some act which would amount to a declaration of intention, that he wishes to become the owner of another *estate*. From these principles it follows that when a husband has a term of years in right of his wife, and a reversion in his own right, and he makes a conveyance sufficiently operative to pass both estates,' the term will be merged.

And in *Carter and Lowe* (a) on an ejectment, the case was, a termor devised his term to I. S. and made his wife executrix and died; the woman entered and proved the will, and took husband, who took a *lease* of the *lessor*, and after the devisee entered and granted all his estate to the husband and wife:' one question was, if by the acceptance of the new lease by the husband, the term which the woman had to *another* use, viz. to the use of the testator, should be considered as surrendered; and the opinion of the court was clearly that it was a surrender.

Now this case must have been decided wholly on the ground of the *powers* of the husband to dispose of the term, and that his acceptance of another lease amounted to a disposition of the term.

Cases may happen in which the husband may have a freehold, and also the fee in

(a) Owen, 56. Moor, 358.

right of his wife. As often as this occurs, and there is no particular reason as joint-tenancy, tenancy by intireties, &c. to keep the estates apart, there is ground to contend that the estate of freehold will merge in the fee, and that it will be immaterial whether one of these estates be an accession to the other by the concurrence of the husband, or merely by the act of law. In each estate the interest of the husband is equally extensive, and equally beneficial. He can receive no prejudice from the application of the doctrine of merger, and therefore there is no ground for allowing of the exception in these cases. When one of these estates is vested in the husband and wife by *intireties*, (*a*) then the reasons of the exemption from merger are applicable.

It remains to be added (*b*) that a lease was made to baron and feme for years, who entered; the lessor afterwards enfeoffed the baron who died seised. The feme survived and claimed the term, and betwixt the feme and the heir of the baron, the debate was, whether this term was extinguished? And it was held, *per totam curiam*, that by the acceptance of the feoffment, the baron had surrendered the term, and it was extinguished. But it was said if the conveyance had been

(*a*) Shep. Touch. 315, 316. 1 Inst. 299. Perk. s. 619.
(*b*) Cro. Eliz. 712.

by bargain and sale inrolled, or by fine, it had been otherwise.

This case, *if law*, would prove that the husband by suffering the reversioner to make a feoffment, allowed his right to deal with the possession, and that the husband afforded evidence of his having renounced the possession. But the case has very little weight. Since on the legal principles already established, the *purchase* of the inheritance, by any mode, would have extinguished the term.

Of the Accession of one Estate to another, when the two Estates are held in different Rights, one as Executor or Administrator, and the other in proprio jure.

On the extent of the exemption from merger, as it applies to two estates, when one is held in right of a testator, or of an intestate, the cases already cited afford the general outline.

The distinction to be extracted from these cases is, that when either of the two estates(a) *is an accession to the other by the act of law*, there will not be any merger, and that the lesser estate will merge as often as one of

(a) Bro. Lease, 63. Surrender, 52.

them is an accession to the other, by the act of the party.

The cited cases shew the application of the doctrine only as between terms for years on the one hand, and the freehold, or the fee, on the other hand.

At this day executors or administrators may have an estate of freehold in right of a testator or intestate; and there is every reason to incline to the opinion that estates of this description, when held in right of a testator or intestate are equally the objects of the exemption from merger.

On the continuance of the privilege from merger, an observation presents itself which will be properly introduced into this place. Though a person is originally intitled to a term, or to an estate of freehold, as an executor or administrator, yet in process of time he may become the owner of that estate in his own right. This happens in the case of executors, when the executor is also residuary legatee, and he performs all the purposes of the will, and holds the estate as legatee; or when the executor pays money of his own, to the value of the term in discharge of the testator's debts, and with an intention to appropriate the term to his own use in lieu of the money. And in the case of administrators when the administrator is the only person intitled to the beneficial ownership of the intestate's property,

or procures a discharge from those who are to share that property with him, and all the debts of the intestate are paid. Under these and the like circumstances the executor or administrator will have the estate in his own right; and when he has the estate in his own right, it will be subject to merger.

Generally speaking it is difficult to ascertain when the character of executor or administrator ceases, and the ownership, independent of that character, commences. Every case must depend on its own circumstances. This only is certain, that when the executor or administrator ceases to hold the estate in that character, he will hold the same in his own right, and it will be subject to merger. (*a*)

Of the Exemptions from Merger as between Persons who are seised as Individuals of one Estate, and of another as part of an aggregate Corporation.

The next head to be considered is the exception to merger as it applies between persons who form part of a *corporation aggregate* of many, and who have estates in their individual capacity, at the same time that the corporation of which they are a

(*a*) Bosanq. and Puller's Rep. 311.

constituent part, has an estate in the same lands. As against persons who answer this description, and sustain this character, there cannot be any merger, either of the estate held in right of their corporation, or of the estate held in their own right. In point of law they are not entitled to the two estates. In the estate held in right of the corporation,(a) they have no interest or estate individually. The law distinguishes the persons, who compose the corporation, from the corporation itself; and the individual, as an individual, has no power of aliening the estate held in right of the corporation. It must be aliened by a corporate act; by the act of the body corporate in its political state; and not of the members of the corporation in their individual capacity. This idea is carried to the extent, that a member of a corporation aggregate of many, and not being the head of that corporation, may make an effectual grant to the corporation of which he is a member, or take under a grant from the same corporation. This consideration distinguishes the situation of the members of aggregate corporations, from the individual in whom the character of a sole corporation is fulfilled; for he cannot *grant to*, or take under a grant

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(a) 1 Inst. 9. a.

from himself. *Jenkins* is express on this point.(a) A mayor and commonalty cannot enfeoff the mayor by deed with a letter of attorney; so of a dean and chapter, for the head cannot be severed from the corporation: it is not a corporation without the head, but they may enfeoff one of the commonalty, for the corporation remains without him; so of the dean and chapter. And he accounts for the difference that there shall be a merger when two estates meet in the person, who represents a sole corporation, and that there shall be no merger when two estates meet in a person who is one of several members composing a corporation aggregate, by laying down a general rule, that the same person, at the same time cannot *have an assize and an ejectment for the same land;* and he concludes, that this is the reason that if a lease for years be made to A. who becomes parson, the lease is extinct; and so of a master of an hospital; but that if a lease for years be made to A. one of the commonalty of *London,* and afterwards he becomes mayor, this lease is not extinct; and so of a dean and chapter;(b) for the member of the corporation in this case, does not make the

(a) Jenk. 5 Cent. 200.
(b) See 1 Inst. 325. b.

body corporate, nor at the time of the lease made was *head* of the corporation: and that there are two several persons in this case of a corporation aggregate; one a natural body, who may bring an ejectment; the other a body politic and aggregate, which may bring an assize, and both at the same time for the same land.

Other Exceptions.

The exceptions in favour of estates-tail, and of those who have an *instantaneous* or temporary seisin, to the intent that uses may be raised upon their seisin, might with propriety have been considered in this place: for the former of these exceptions is allowed on legal, the other on equitable grounds, expressly adopted into the law by the statute of uses. The principle is that these estates are not held by the person as the complete owner of them. On the exceptions, as they apply to these estates, a more enlarged and detailed view will be taken under a particular division set apart for this purpose.(*a*)

(*a*) 2 Black. Comment. 178.

The Exemption does not apply between Trustees and Cestui que trusts.

Notwithstanding one of two estates is held in trust, and the other is held beneficially by the same person;(*a*) or that both estates are held by the same person upon the same or upon different trusts, the doctrine of merger will operate on these estates. For as to legal estates, the exception to the application of this doctrine, extends to those instances only in which one person has the *legal* ownership of several estates, in different rights; one in his own right, and the other in another right: and in which the law, as distinguished from equity, (*b*) takes notice of these different rights. Now of trusts the law does not, for this purpose, take any notice. Over the beneficial ownership under the trust, courts of equity alone have jurisdiction. But though, in point of law, the doctrine of merger takes places, *equity will interpose*, and by its interference will, as against the person who has occasioned the prejudice to the beneficial owner intitled under the trust, and all persons claiming under him without consideration, or with notice of the equitable title, support the trust by way of charge upon the land, by decreeing possession of the

(*a*) Siderfin 75. Lee's case, 3 Leo. 114.
(*b*) 3 Leo. 6.

lands for the time of the estate which is merged, or by decreeing a conveyance as the circumstances of the case shall require, and as will be the means of administering the most complete and effectual justice to the *cestui que trust*. There are a few cases in the books, from which these distinctions may be collected.

In *Vincent Lee's* case,(a) *Vincent Lee* being seised in fee, had issue three sons, F. G. and J. and devised that J. his son should have the land for thirty-one years without impeachment of waste, to pay certain debts and legacies; the remainder after the term expired, to the heirs male of the body of the said J. begotten; and further willed, that if the said J. die within *the term* aforesaid, then G. his son shall have such term, and then also shall be executor; but made the said J. his present executor, and died.

J. entered by force of the devise, F. died without issue, by which the fee-simple descended on J. who had issue P. and died within the term.

P. entered—G. as executor, entered upon him, and he re-entered,—upon which reentry, G. brought trespass.

And it was held that the plaintiff, namely, G. the devisee of the second term, should recover.

(a) 3 Leo. 110.

And by *Manwood*, in construction of wills, all the words of the will are to be compared together, so as there be not any repugnancy between all the parts of the will, or between any of them, so that all may stand: and the intent of the testator was, that his son J. should have the lands for thirty-one years, if he so long lived, and if he died within the term that G. his son should have such term. And he held that the same was in J. an estate by limitation, and he could not sell it, nor could it be extinct by act in law, *or of the law*. It was a lease determinable by his death, and so shall be the lease of G. determinable upon his own death; and G. upon the death of J. within the term shall have the residue of the number of the years limited by the former devise; *scil.* so many in number as were not expired in the life of J. who was first executor to that special purpose. *Gent, Baron*, to the same intent: here he hath the same term as executor; and it is not like a term devised which the party hath as legatee; but in our case he hath only authority in this lease as executor, and the land was tied to the time, and the authority; and when the same determines in his person, then the land departs from him to G. who was a special executor to that purpose, as J. was before. And G. had not the same term which J. had; but *such* a term. *Clark, Baron*,

accorde; and he said that the will was further, that if G. died before his debt, paid, and his will performed · and the jury finding all the special matter concluded, that if the term limited to J. be extinct, then they find for the defendant. And he held clearly that J. had this term of thirty-one years as executor, and that by the *descent of* the inheritance to J. the term *as to himself* was gone; but as to creditors and to the legatees, it shall be said *in esse*, and be assetts in his hands: and because that the term, as to that purpose, shall be said *in esse*, he died within the term, within the intent of the said will. And this word, term, is, *vox polysema, terminus status, terminus temporis, terminus loci.* And in our case the word term, hath reference to time, and not to estate; for the testator did respect the time in which his will might be performed, and that was thirty-one years: as if J. make a lease during the term that J. S. hath in the manor of D. and J. S. hath forty years in it; now although that J. S. surrendereth or forfeiteth it, yet he shall hold over, but he shall have it for forty years; for my lease refers to the time, and not to the estate. In the like manner, here G. cannot have the same term which J. had, nor for thirty-one years after the death of J. but so much of the said thirty-one years shall be cut off in the interest of it, as J. had enjoyed it;

and G. shall have as many years as J. hath left; and G. shall perform so much of my will as J. at his death within the term aforesaid, shall not have performed: as if I lease my land to one until he hath levied one hundred pounds, and if he dieth before that he hath levied it, then J. S. shall have such term for the levying of it: the first lessee levieth fifty pounds and dieth, J. S. may levy the residue, but not the whole.

The case of *Vincent Lee* must be read with great caution. It contains many propositions applicable to merger, which are not to be understood as law. For J. had the term as devisee and not as executor: and if he had had the term as executor, the term would not have been merged by a *descent* to him.

Again in *Marmaduke Danby v. John Danby and Samuel Pierce*, (*a*) the plaintiff was possessed of the lands for a long term, viz. three thousand years, and being very aged, and having several young children, the defendant *John*, his son and heir, by combination with the other defendant, *Pierce*, who was seised of the reversion in fee, did fraudulently procure him to convey the same to the use of the plaintiff and his heirs, or to the use of the plaintiff for life, remainder to

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(*a*) Finch Rep. 220.

the defendant *Danby* and his heirs, or to some such effect or purpose to drown the said estate and term of years in the inheritance of the premises, and this without the plaintiff's privity, and to hinder him from making a provision for his younger children. All this matter appeared to the court; and it was decreed that the plaintiff, his executors, administrators and assigns, and all claiming by or under him or them should peaceably hold the premises, during the said term of three thousand years, against the defendants, and without their interruption, and notwithstanding such conveyance there should be *no merger* of the term, and that the same should not be given in evidence, or any use made of it against the plaintiff, his executors, &c. And that the plaintiff, and his executors, &c. might assign and dispose thereof, in as ample a manner as if such conveyance had never been made.

The precise import of this decree is not easily collected from the report. When the court said there should be *no merger* of the term, they must have meant, in point of effect and beneficial ownership. That the term was merged at law, was not denied; and the court could not restore the termor to his legal right, or revive the term, or prevent the legal operation of merger. Its jurisdiction was confined to the power of restraining those, who had practised this fraud on the

plaintiff, from availing themselves of the legal right they had obtained under this operation of the law. This, in truth, was the scope of the decree, and it is evident that the court considered the situation of the parties in this light. To what other purpose did the court decree, that the plaintiff should enjoy without any interruption from the defendants? for unless the term was merged, the defendants could not give any interruption to the complaint, and when the court restrained the defendants from giving in evidence or making use of the deeds, which caused the merger of the term, they must have proceeded on the conclusion that the term was merged at law, and that this was a mode of depriving the defendants of all advantage from the fraud they had *practised.*

So that this case may be considered as proceeding on the admission that a merger had taken place.

In *Saunders v. Bournford, Allen, and others, John Allen,*(a) who was seised in fee, did by indenture, dated 25th April, 10th James, grant the lands to *Richard Saunders,* with a covenant for further assurance. This grant was only for a term of one thousand years, and *Richard Saunders,* upon the marriage of his

(a) Finch's Rep. 424.

son *John*, with *Ann Andrews*, assigned the residue of the term to his son *John*, who enjoyed the same for thirty-five years.

John Saunders, on the 20th August, 1662, assigned the remainder to *Thomas Harris* and *John Allen*, the grandson of the first lessor, who at that time had the reversion, as the heir at law of the lessor, in trust for the benefit of his wife and children. The trustees accepted the trust, and declared it to be for *Ann* the wife of *John Saunders*, and for the education, and raising portions for her younger children, and after her decease, in trust for *Edward* her eldest son, and that on request they would assign the same to him, and the premises were enjoyed accordingly. *Edward* in 1668, devised the residue of the said term to *Margaret* his wife, who on the 23d July, 19 Car. 2, sold it to the plaintiff, *Nicholas Saunders*, for a valuable consideration, and *Thomas Harris*, who was the surviving trustee of *John Saunders*; and the children of the said *John* all joined in the sale, and the plaintiff enjoyed the premises quietly for many years.

Afterwards *Isabella Allen*, claimed a title as heir at law of *John Allen*, the original lessor, viz. as daughter and heir to *Thomas Allen*, who was son and heir of *John Allen*, who was son and heir of the said *John* who granted the original lease. The defendant *Bourn* claimed as administrator

de bonis non of *Thomas Allen* and *John Allen*, his son.

The title of *Isabella* was, that a moiety of the said term was merged in the inheritance, for that *John Saunders*, 20th August 1662, assigned the whole to *Thomas Harris* and *John Allen*, who was then heir at law to the reversion in fee, and grandfather of the said *Isabella*; so that a moiety of the said term was merged in him, and *Isabella* had recovered the said moiety in ejectment, and was then in possession thereof. The plaintiff therefore exhibited his bill against the defendant, to have one moiety of the term confirmed to him, which was then claimed by the administrator, *de bonis non*, and that *Isabella* might make a *new grant* of the other moiety which was merged as aforesaid.

And the court decreed that the plaintiff should hold the premises during the remainder of the term, *notwithstanding the merger of the moiety*, and that the defendant *Isabella* should make a further assurance of the remainder of the said term, so that in this case the court clearly and unequivocally recognized the law of merger, and its application to one moiety of the term; for the terms of the decree are, that the plaintiff should enjoy *notwithstanding the merger of the moiety*: and the court extended its relief, by decreeing that a conveyance should be made of that moiety, for the residue of

the term by *Isabella*, in whose estate, when vested in her ancestor, the moiety of the term had been merged. This case then is an authority for the general assertion which has been made, that equity will support the interest of the *cestui que trust*, and will also order a conveyance to revive the legal estate, when such conveyance is requisite to the due administration of justice.

On this case other observations present themselves. It shews that equity will interfere, and administer relief, even when the merger has been a consequence of the act of the trustee of the term which is merged; and will extend its relief even against the heir of that person, although no fraud is imputable to this person or his heirs. The ground of relief in these cases is, that the merger of the term is an *accident* prejudicial to one of the parties interested, contrary to the *agreement between them*, and their intention, and perhaps in some degree on the presumed agreement, on the part of the reversioner, that he will be a trustee for the purposes declared of the estate which is merged.

From *Cheney's* case it appears that this was the law prior to the statute of uses; and if it was the law at that time it must be the law at this day. Without the exception in the statute of uses which saves the former estate of a releasee, feoffee, &c. to uses, it should seem that at law the estate, previously in the

feoffee, releasee, &c. would have merged; and that the legislature, aware of this application of the law, and also of the controlling jurisdiction of a court of equity, placed the case on the footing on which it stood in equity, in those instances in which the trustee would not have been compelled to convey the estate, of which uses were declared, till he had secured to himself the same degree of ownership, which he had before his former estate was merged, by the *acceptance*, or *descent*, of the estate of which uses were declared.

Before the observations on the case of *Saunders and Bournford* are closed, it will be material to observe that for the claim of the administrator *de bonis non* of *Thomas Allen* and *John Allen* his son, there was not the least pretence at law or in equity. There either was a merger of the term for a moiety or not: if there was not any merger, then the whole term continued to *Harris* the surviving trustee; and if the term was merged for a moiety, the moiety of the term must have been merged in the inheritance; and no one except the heir at law, could have supported a claim in respect of the other moiety of the lands comprised in the term.

The consideration of this point of equity also arose on the Duke of *Norfolk's* case;(*a*)

(*a*) 3 Ch. Ca. 15.

and though in that case the term was extinguished by *surrender*, and not by merger, yet the reasoning is equally applicable: and in delivering his opinion on that case, Lord Chief Baron *Montague* said, this term is gone indeed, and merged in the inheritance, yet the trust of that term remains in equity; and if this trust be destroyed by him, that had it assigned to him, this court (the chancery) has full power to set it up again, and to decree the term to him to whom it did belong, or a recompence for it.

In *Villers v. Villers*, (*a*) it was insisted, on one side, that a term of sixty years was merged, by being created to the same person to whom the fee was devised, who had likewise the reversionary interest in another term for ninety-nine years; but Mr. *Villers's* counsel, on their side, contended there was no merger, because there was a *trust of the* term that kept the term separate, and consequently it was not merged.

This argument may be tenable in equity, when a distinct right is in a stranger under the trusts; but then the legal estate merges, and equity interferes only to sustain the interest of the *cestui que trust*.

Most of the cases cited as applicable to the point under consideration, have arisen on

(*a*) 2 Atk. 72.

the merger of the estate, charged with the trust, in the estate which the trustee had in his own right. Cases may occur in which the estate of the trustee, held in his own right, may become merged in an estate, conveyed to him, or devolving on him by descent. Under these circumstances, the doctrine of merger is, on the one hand, equally applicable between these estates; on the other hand, courts of equity are equally open to afford relief to the trustee for the purpose of giving him the full benefit of his own estate. The equity of the trustee is equally as strong as the equity of the *cestui que trust*; and the court would not order the trustee to convey, till the time of his estate was expired, or without allowing him to make such a conveyance as would give him a legal title to an estate, of the same extent and equally beneficial with his former estate.

Though a trust will not prevent the merger *of one* of two legal estates, (*a*) yet when the same person has the trust or beneficial ownership, and also the legal estate, though they are derived under distinct titles, the trust will merge in the legal ownership. For this purpose there is a general rule in equity, admitting however of some exceptions,

(*a*) Cooke v. Cooke, 2 Atk. 67. Willoughby v. Willoughby, 1 Term Rep. 766. Goodright v. Sales, 2 Wils. 331. Villers v. Villers, 2 Atk. 72. Capel v. Girdler, 9 Ves. 509.

that a person cannot be a trustee for himself; and another general rule, also admitting of some exceptions, that as between real and personal representatives, or between different classes of *heirs*, or heirs in different lines, (*a*) there is not any equity. The legal right must prevail, and it prevails, because a court of equity will not administer any relief.

Therefore, except in the case of infants, &c. an equitable charge will merge in the legal ownership when they are united; an equitable term will, as between the heirs and executors, merge in the legal estate of inheritance; an equitable fee by descent *ex parte paternâ*, will merge in the legal fee taken by descent *ex parte maternâ*: so as, in the two former cases, to exclude the person intitled to the charge, and in the latter case to exclude the paternal heirs, in favor of the maternal heirs.

In *Doe, lessee* of *Balch*, *v. Putt and others*, which was determined in the court of Common Pleas, in Trinity term, 8 Geo. 3. the circumstances were these:(*b*) It was an ejectment tried before *Hewitt*, Justice, at the assizes for Somersetshire, and a special verdict was found, which stated, that *Mary Mortimer*, being seised in fee of an estate, of which the premises in question were an

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(*a*) 3 Ves. Jun. 339.

(*b*) Cited Dougl. 772.

undivided moiety, on her marriage, conveyed to trustees and their heirs, to the use of them and their heirs, upon trust, to permit her to receive the rents and profits to her separate use during life, and to grant and convey the estate, or any part thereof, to the use of such person or persons in fee, or otherwise, as she, whether married or sole, by deed or will should appoint, and for want of such appointment to the use of the husband for life, remainder to her first and other sons in tail, remainder to her daughters in tail, as tenants in common, remainder to her right heirs. The marriage took effect, and she died, leaving her husband and an only daughter, an infant; the husband afterwards died, and then the daughter died, being still under age, and without issue. The lessor of the plaintiff, and one *Newton*, were the heirs at law of the daughter *ex parte maternâ*, (being the sons of two deceased sisters of the mother,) and on the daughter's death, they entered on the estate. The lessor of the plaintiff, and the surviving trustee, by lease and release, reciting as above, and that *Newton*, had, for a certain sum, agreed to purchase the lessor of the plaintiff's moiety, and in consideration of the stipulated price, conveyed that moiety to *Newton*, in fee. On the same day, by lease and release, also reciting as above, the trustee conveyed the

other moiety in fee to *Newton*. *Newton* died, seised of all the estate, leaving the lessor of the plaintiff, his heir at law *ex parte maternâ*, and the defendants his heirs at law *ex parte paternâ*. The question on the special verdict was, whether the moiety conveyed by the surviving trustee alone to *Newton*, (for which moiety only the action was brought,) belonged to the lessor of the plaintiff, or to the defendants? The court unanimously decided in favor of the latter, though it was contended, that the *legal estate* should follow *the old use*, which had come to *Newton by descent, ex parte maternâ*: so that though *Newton* took nothing by purchase from the trustee, but the mere legal estate, yet it was determined, that the whole should descend from *Newton*, in the paternal line, as in other cases of purchase.

In *Goodright* v. *Wells*, (a) *James Selby*, serjeant at law, agreed for the purchase of the estate in question, and paid for it, but died before any conveyance was made of it to him, having by his will (made subsequent to the agreement) devised "all the "rest of his real and personal estate, what- "soever and wheresoever, to his said wife, in trust, that she do thereout educate "and maintain his said son, until he should

(a) Doug. 771.

attain the age of twenty-one years, and until he should have sufficiently settled
" and secured to and upon his the tes-
" tator's said wife, what is to be settled
" upon and given to her as aforesaid, and,
" afterwards, in trust to convey and dis-
" pose of all the then rest of his real and
" personal estate, and the produce thereof,
" to his said son, his heirs, executors, and
" assigns; but in case his said son should
" die without issue, before he should attain
" his said age of twenty-one years, then in
" trust, &c." After the testator's death, a conveyance by lease and release of the estate in question, was made to Mrs. *Selby*, the widow, who died before the son attained his age of twenty-one years, and he afterwards attained that age and died in 1772, having been always in possession of the estate after the death of his mother, and having devised it to charitable uses, which devise was void by the statute of mortmain. The lessor of the plaintiff was his heir at law on the part of the mother, and the defendants his heirs at law on the part of the father's mother.

Lord *Mansfield*, (after stating the case,) observed:—Serjeant *Selby*, after his purchase, was owner of the equitable estate, and had a right to go into chancery to compel a conveyance. After his death, the vendor conveyed to the widow, which conveyance,

on the condition of the son's living till twenty-one, and making a certain provision for her, was to be absolutely in trust for him. He outlived his mother, and, on her death, the trust estate was completely vested in him, (the subsequent limitations in the will being on contingencies which never happened,) and the legal estate descended *to him from her*. The question is, to whom the whole estate descended on the death of the son? For it did descend, the devise to charitable uses being void. If it descended from the mother, the lessor of the plaintiff takes as heir at law. But, it was contended, that, though he is heir, there is a trust for the paternal heirs; and it was said to be settled, that the court will not suffer a trustee to recover in ejectment, against the *cestui que trust*. When this was mentioned on the trial, I said, as I did the other day, in the case of *Doe v. Pott*, that this rule is subject to the qualification of its being clearly the case only of a mere trust, for then, by taking notice of it, (*a*) the court prevents delay and expence; but it will not decide when there is a doubt, but leave the question to a jurisdiction which regularly takes cognizance of matters of trust. The counsel said, there might, perhaps, be cases on the subject, and the parties wished to have

(*a*) This practice is over-ruled.

the opinion of the court. Now, who is to be considered as heir at law on this ejectment? It would be sufficient, for the judgment which I shall deliver, to say, that it is not a clear case, that the lessor of the plaintiff is a mere trustee, for, that point being doubtful, he is entitled to recover at law, as he certainly has the legal right. But I will go farther, and throw out some observations, to shew, that it is not only doubtful, but that the inclination of my opinion is, that *you cannot support such a trust*. A case so circumstanced, in every particular, probably never existed before, and, perhaps, never may happen again. But, cases must often have happened on which the general question would arise; viz. whether, when *cestui que trust* takes in the legal estate, possesses under it, and dies, the legal and equitable estate shall open on his death, and be severed by the different heirs? Consider it, first, upon authority; and, secondly, upon principle.

1st. No case has ever existed where it has been so held; none where the heir at law of one denomination, has, on the death of the ancestor, been considered as a trustee for the heir at law of another denomination, who would have taken the equitable estate, if that and the legal estate had not united.

2d. On principle, it seems to me impossible; for the *moment both meet in the same person*, there is an end of the trust. He has the legal interest, and all the profits, by his best title:—*A man cannot be a trustee for himself.* Why should the estates open upon his death? What equity has one set of heirs, more than the other? He may dispose of the whole as he pleases, and, if he does not, there is no room for chancery to interpose, and the rule of law must prevail. The case in the Common Pleas(*a*) is an authority, if it went on this ground, and I am told it did. There, the *cestui que* trust taking the legal estate as a purchaser, the descent was altered. *Quâcumque viâ datâ*, therefore, the lessor of the plaintiff is intitled. If the question is doubtful, then, in this court, the legal right must prevail, and, if the weight of opinion and argument is, that the legal estate must draw the trust after it, the case is still stronger against the defendants.

Willes, Justice—I entirely agree with my lord as to the legal estate; but my doubt is, what has become of the equitable use: let us see how the facts stand. The money was paid by the father, but he died before any conveyance; devising as stated in the

(*a*) Doe v. Pott, supra, 328.

case. Now what was the antient use? It was to the heirs *ex parte paternâ*. I do not agree, that there is no difference as to the different heirs—When the question is between those of the paternal, and those of the maternal line, the law always gives the preference to the former. After the father's death, a conveyance was made to the widow and her heirs, in trust. So, the estate in her was not absolute, but charged with the trust. Suppose the son, in his life-time, had called in the legal estate, and become a purchaser, there is no doubt, but, in that case, the paternal heirs would have succeeded. There having been no such conveyance to him, the legal estate descended to him from the mother. But I think he took it clothed with the trust, and subject to the ancient use: I do not say he was a trustee for himself, but this ancient use remained uncontrolled, and revived, as between the different heirs, on his death; no act having been done to alter it. If therefore the question were to come before me in another court, *I should decree a trust in the* lessor of the plaintiff. But he certainly is intitled to the legal estate, and that is enough here.

Ashhurst, Justice, added—We all agree, that, if there is a doubt as to the trust, the lessor of the plaintiff is intitled to the estate in this court; and, therefore, it is not ne-

cessary to give any opinion on the other point. But, as it has been moved, I will mention, that I am inclined to be of opinion, that the trust, as well as the legal estate, shall go to the heirs *ex parte paternâ*. To support the contrary position, it must be said, that the son took as trustee for himself and his paternal heirs; for I do not see how the estate shall open for the heirs, if he was not himself a trustee: I never knew any case where the court held, when an estate came by descent, that the heir was a trustee although the ancestor was not. The case in the Common Pleas goes a great way to determine this question; for it shews, that, where the trust and legal estates join, they shall both go according to the legal estate.

Buller, Justice, observed—I am entirely of the same opinion with my lord, and my brother *Ashhurst*, on both points. On the first, we are all agreed. As to the second, it is observable, that no case has been cited, nor do I believe any ever existed, where, in a court of equity, an heir of one sort has been determined to hold as trustee for an heir of the other sort. In a court of law, try the question by the principle stated by Mr. *Batt*, (one of the counsel) viz. that, where two titles unite, the party shall be in of the best. What is the better title here? The clear fee-simple estate which descended from the

mother. I think there is a mistake in taking the heirs on either side into consideration. They had no interest during the life of the ancestor; the whole was in him. The only person to be considered is the ancestor, who was seised in fee both of the legal and equitable estate. A case has been put, which does not, in my opinion, vary the question, viz. the case of the son's having called for a conveyance. However, as the mother died before he came of age, and she was not directed to convey till then, that case does not apply. We are to take the facts as they stand. To be sure, if he had taken the legal estate by purchase, the paternal heirs would have been intitled, but as he took it by descent from his mother, (and the case would have been the same if we suppose her to have lived beyond his age of twenty-one, and that he never called for the conveyance,) I think the trust was merged and gone.

For the purpose of trying whether in this case the paternal heir had any equity against the maternal heir, a bill was filed in Chancery, and the case received a determination in that court in favor of the maternal heirs.(a) The court observed—Then the next question is, whether upon the

(a) 3 Ves. J. 339.

case made by the plaintiff, he is intitled to an equity. The question at law was clear: there could be no question about that; but the judges intimated their opinions upon the equitable point. The argument of Mr. Justice *Wilson* was more equitable than legal. We have an intimation of the opinion of Lord *Mansfield*, and a strong opinion of the judges *Ashhurst* and *Buller* against the equity. Mr. Justice *Willes's* opinion was in favor of the equity. The question now is, whether upon the case now coming before a court of equity, the opinion of the three judges is such as this court will follow. I do not say, the case is free from all difficulty; and there may be good reason to contend, that the situation of the trustee, shall not affect in any degree the estate coming from him to his *cestui que* trust: but I must not lay that down too broadly; for that is not the fact. In *Philips* v. *Brydges*, (*a*) I stated as an universal proposition, that wherever the legal and equitable estates uniting in the same person, are co-extensive and commensurate, the latter is absorbed in the former. I stated, and I think I was warranted in so doing, that no act of the trustee, can in any degree vary the right of the *cestui que* trust; but I did not state, nor upon full consideration

(*a*) 3 Ves. Jun. 126.

am I prepared to say, that it was ever held that the situation of the trustee, and the operation of law, arising from that situation, and the relation to the *cestui que trust*, does not make considerable difference in the estates to be taken: as, for instance, supposing the trustee was an ancestor of the *cestui que trust*, and dies; and then the *cestui que trust* dies: is there any doubt that his widow would be dowable: though if the *cestui que trust* died first, she unquestionably would not. It has been argued, that the trustee is a mere instrument, and his situation or act can have no effect at all upon the estate. I have put a case, where the fact being, that the legal estate descends upon the *cestui que trust* and is united with the trust-estate, he becomes solely seized at law, and both his widow and heir are intitled. Therefore, the situation of the trustee (I do not say his act) may make a considerable difference. If the widow of Mr. *Selby* had conveyed to the son, it is clear he would have taken an estate descendible to his heirs *ex parte paternâ*. Suppose she had made a feoffment to the use of herself for life, remainder to her son; she would have had no intention of giving the estate in any new line: (it is to be supposed, she would rather it should continue it in the line, that would carry it to her own heirs; but that act, though not

done with that view, would have such an effect. So, where an heir takes by devise instead of by descent, the consequences are different: but that was never insisted on as a ground of equity. If an heir *ex parte materná* takes by devise, that would let in his heirs *ex parte paterná;* and if they fail, his heirs *ex parte materná* also: if he takes by descent, he would only take an estate descendible to his heirs *ex parte materná*, and yet if he can take by descent, the law makes him take so. The case of an escheat does seem a hardship upon the line of heirs that would have succeeded, if Mr. *Selby* had taken from his father. That is the only argument, that pressed upon my mind. Where the person himself has an equal, co-extensive, estate at law and in equity, the legal shall prevail, notwithstanding the case I have put of the escheat. I have not found, that courts of equity have ever upon that circumstance held, that he is not to be considered as having a co-extensive estate in law and equity.

The case relied upon in *Phillips v. Brydges*, was *Wade v. Paget*, 1 Bro. Chan. Cas. 363. There Lord *Thurlow* lays down a universal proposition, to which I am inclined to accede; that where the estates unite, the equitable must merge in the legal. That was the principle of the opinion of the judges in *Goodright v. Wells*; and upon con-

sideration I am inclined not to lay any restriction upon or to narrow it in any respect, but to hold, that by whatever means, whether by conveyance or otherwise, a person obtains the absolute ownership at law of the estate, though he acquired that by an equitable title, and both either came together or are afterwards united in him, the legal will prevail, the equitable is totally gone for the purpose of being acted upon by any person in this court. Therefore that being to be laid down universally, this demurrer must be allowed against the plaintiff claiming as heir *ex parte paternâ*.

In this place the case of *Goodright v. Searle* must be remembered, as proving that when a person has a fee, subject to an executory devise in his mother, and the interest under the executory devise descends to him, and the event happens on which the executory devise is to operate, the descent from the mother will govern the title; consequently the interest by executory devise is not extinguished in the fee. On this case a more ample discussion will be found in a subsequent division.

On the Merger of Estates-tail, and their Exemption from Merger.

Estates-tail are privileged from merger; and *Blackstone* (*a*) has said that a man may have in his own right both an estate-tail and a reversion, and the estate-tail, though a less estate, shall not merge in the fee;(*b*) and it was his opinion that estates-tail are protected and preserved from merger by the operation and construction, though not by the express words of the statute *de donis;* and that this operation and construction arose probably upon the ground that in the common cases of merger of estates for life, or years, by uniting with the *inheritance, the particular tenant had the sole interest in them, and had full power at any time to defeat, destroy or surrender them;* and therefore when such an estate united with the reversion in fee, the law considered it in the light of a *virtual surrender* of the inferior estate. But he observes that in an estate-tail the case was otherwise, that the tenant for a long time, had no power at all over it, so as to bar or destroy it, and now can only do it by a certain special mode, as by a fine or recovery, and the like: it would therefore have

(*a*) 2 Comm. p. 177.
(*b*) Wiscot's Case, 2 Rep. 60.

been strangely improvident, to have permitted the tenant in tail, by purchasing the reversion in fee, to merge his particular estate and defeat the inheritance of his issue; and that hence it has become a maxim that a *tenancy in tail which cannot be surrendered, cannot also be merged.* For the same reason that an estate-tail cannot merge in the remainder or reversion in fee, one estate-tail, as it has been already observed, cannot merge in another estate-tail.

But the gift of an estate-tail to the tenant of a like estate-tail, may, if it proceed from a reversioner, operate to the same extent as a release of the seignory: and if the second estate-tail be of greater extent than the first estate-tail, then, whether the gift proceeds from a reversioner or remainder-man, a new intail will be created: as if a gift be made to a man and his heirs of his body, who is already tenant in tail, male or female; or to a man and his heirs of his body generally, who is tenant in tail, under a gift to him and the heirs of his body by a particular woman.

These positions are perfectly consistent with the doctrine established by the cases of *Cholmey*,(a) and *Badger v. Lloyd*,(b) already cited. The observations in these cases

(a) 2 Rep. 50.
(b) Salk. 232.

are applicable only to two estates-tail of the *same extent*: and nothing is more common in practice than to see two estates-tail in the same person, either by purchase or descent; and sometimes one by purchase and the other by descent; and the issue under each intail will take according to the priority in the creation of that intail.

It was certainly in favor of the issue that estates-tail were privileged from merger; and it is in consequence of an equitable construction of the statute *de donis*, that the estate-tail does not merge, when the estate-tail and the reversion or remainder in fee, meet in the same person. And it should seem that it is only as against the tenant in tail, when he has the two estates, and the issue in tail, when the time of the estate-tail and also the immediate remainder or reversion in fee, are vested in a stranger, that the estate-tail, or rather the ownership of that estate, is exempted from merger: for according to *Gilbert*, in his Tenures, a grant by tenant in tail to the reversioner, will operate as a surrender, namely, (for so the proposition must be understood,) as a surrender, between all persons claiming under the reversion and not as against the issue in tail; or only *quodam modo* against them. Till barred, the surrender is voidable. For the same reason that the time of theestate-tail may be considered as surrendered, it may, in a case

with corresponding circumstances be considered as merged.

The statute of intails would have been of little effect if the estate-tail had not been protected from merger, (a) and in *Wiscot's* case, the opinion of the court was, that if there be tenant in tail, the remainder to his right heirs, he may grant his remainder over or devise; for an estate-tail cannot drown, nor be surrendered, nor be extinct by accession of a greater estate.

But this peculiarity of an estate-tail, and its exemption from merger, continue so long only as the privileges of the statute *de donis* in favor of the issue, are annexed to that estate.

From this deduction, it appears in the most satisfactory manner that the exemption from merger is for the benefit of the issue. It has been already observed, that an estate-tail, after possibility of issue extinct, or an estate-tail which by means of a fine barring the issue of their right of succe sion under the intail, is converted into a determinable fee, will merge: and it may be advanced as a *general rule*, that when there is not any longer a possibility that the *issue* in tail can claim a right to inherit the estate in that character, and *per formam doni*, the estate-tail

(a) 2 Rep. 60.

ceases to retain the quality of being privileged from merger.

That an estate-tail after possibility of issue extinct is subject to merger, has been sufficiently proved by the several authorities already adduced in support of that position; and that an estate-tail is not exempt from merger, when the right of the issue under the intail is destroyed, is clear from the cases of *Holt v. Sambach, Symonds v. Cudmore, Kingaston v. Clarke,* and *Earl of Shelborne v. Biddulph.*

In *Holt v. Sambach,*(*a*) Sir *William Catesby* being tenant for life of land, the remainder in tail to *Robert,* his son, remainder in tail to himself, remainder to *Robert* in general tail, the remainder in fee to himself, granted a rent of ten pounds a year out of the intailed lands to *William Sambach* in fee; and Sir *William* and *Robert* his son levied a fine with proclamations to the use of the said Sir *William* in fee, and afterward the said Sir *William* enfeoffed Sir *Thomas Holt* and died. *Robert* had issue *Robert,* and died; and the court was of opinion that this grant in fee was good; for he had an estate for life in possession, and an estate of remainder intail, and remainder in fee to himself to charge, and then the fee-simple passed by the grant;

(*a*) Hutton 96.

and although *Robert* the son might have avoided it, yet, when he had barred the estate-tail by a fine to the use of Sir *William*, now Sir *William Catesby*, had by the acceptance of this estate to himself, avoided the means by which he might have avoided the rent; and that although in *Bredon's* case when tenant for life and he in remainder in tail, join in a fine rendering rent to tenant for life, that passeth from every one, which might lawfully pass, and that the rent continued after the death of him in the remainder in tail without issue, yet in this present case the estate was barred by the fine; *united* to that estate which *William*, the grantor had, and then *William* was seised in fee, and the rent made unavoidable.

In *Symonds* v. *Cudmore*(a) Sir *Nicholas*, *Martin* was tenant for life with remainder in tail to *William* his eldest son, and having a power to make leases for twenty-one years, or three lives, reserving the antient rent, made a lease to *Clement Westcome* for ninety-nine years, if *Richard* and *Nicholas Westcome* should so long live, reserving the antient rent, which was eight pounds ten shillings per annum.

(a) 4 Mod. 1.

Sir *Nicholas Martin* died, leaving issue *Nicholas Martin* his eldest son and heir, who being then seised of the remainder in tail, and also of the *reversion in fee* expectant on the determination of that estate, did by indenture release the said rent, and before the determination of the aforesaid lease made by his father, demise the premises to *Elizabeth Westcome* for ninety-nine years, if *George* and *William Westcome* should so long live, to commence after the determination of the first lease.

William Martin died, leaving issue *Nicholas Martin* his eldest son and heir, who being the issue in tail, levied a fine to the use of himself and his heirs? Afterwards, the first lease determined, then *Nicholas Martin* entered and made a lease to the plaintiff *Symonds*, upon whom *Cudmore* the defendant (being the assignee of the second lease) entered, and whether his entry was lawful was the question.

One of the arguments offered in support of his right of entry was, that the estate was in being; that though it might be barred by the fine, yet it *was not extinct*; that the estate-tail was not extinguished by this fine, because the law would suppose an existence of it in the cognizee to prevent a wrong; and that therefore where such an estate was intermixed with a fee, it should

have a being against this wrongful and tortious lease.

The determination was in favor of the lease made by *William Martin*, and against the right of the conusee in the fine to avoid the lease. The court held, that this lease was an interest derived out of the estate-tail, and that it also charged the reversion in fee; that *the estate-tail was extinct;* for if it should be otherwise, then there would be two fee-simples in one and the same person; a qualified fee determinable upon the death of tenant in tail dying without issue, and an absolute fee out of the reversion, which could not be; that *William Martin*, the tenant in tail, having also *the reversion in fee*, the lease made by him issued out of both the estates; and the issue in tail had extinguished the estate-tail by levying of the fee, so that the conusee must be in of the reversion in fee. (*a*)

This case, with a view to the subject under consideration, is reported more pointedly, and at the same time more briefly by *Salkeld*.(*b*) Agreeable to his report of the case, in ejectment a special verdict was found, upon which the case was tenant in tail in reversion after a lease for years, remainder to tenant in-tail in fee, made a lease to commence at

(*a*) Bac. Abr. 323.
(*b*) Salk. 338.

a day to come, and died before the day having issue. After the death of tenant in tail, but before the day the issue levied a fine. In this case the whole court agreed, that the remainder in fee stood chargeable with the lease, and that it should have been served out of the remainder in fee, had tenant in tail died without issue.

Secondly, it was held that the estate-tail *was extinct* by the fine as much as if the tenant in tail were dead without issue: first, *because two estates immediately expectant upon one another cannot subsist in the same person*; secondly, because by 22 Hen. 8. c. 36. the fine is declared to be a bar and a discharge of the estate-tail; thirdly, because the statute of *Westminster* 2. having made estates-tail a kind of *particular* estate, they are (*the protection of the statute being gone by the fine*) like *all other particular estates subject to merger and extinguishment, when united with the absolute fee.*

So in the *Earl of Shelburne v. Biddulph, Esq.* the principle of this last determination was recognised and acted upon, both by the court of Chancery, and afterwards, on an appeal by the House of Lords; and it was held, that the merger operated as well in favor of equitable rights depending upon contract, as in favor of estates subsisting under grants by the reversioner. The case is long, but from its importance deserves

the fullest consideration: the facts were,(a) *Charles,* Lord *Shelburne,* being intitled to the inheritance of the lands of *Logamarley,* otherwise *Annasclan* and *Ballyngown,* in the *King's* county, [in fact to an estate-tail, with remainder to his brother *Henry* in tail, with reversion in fee to himself,] subject to the dower, or some interest for life of his mother *Elizabeth* Lady Dowager *Shelburne*; he, together with his said mother, by indenture dated the 7th Dec. 1692, granted and demised the said lands to *Henry Salmon,* his heirs and assigns, for the lives of the said *Henry Salmon, Henry Salmon* the younger, his son, and *Robert Hutton*; at the rent of ten pounds a year for the first three years, and fifteen pounds a year for the residue of the time; and Lady Dowager *Shelburne* and Lord *Charles* thereby covenanted with *Henry Salmon,* the lessee, his executors, administrators and assigns, that if, upon the death of either of the lives named in the lease, the said *Henry Salmon,* his executors, administrators or assigns, should be inclined to name a new life in the place of him so dying, they would, upon request, perfect a lease of the lands for a new life, under the same rents and covenants as in the then lease, provided that the said *Henry*

(a) 4 Bro. Par. Cases, 594.

Salmon, his executors, administrators or assigns, should pay fifteen pounds in consideration of such renewal, within three months next after such death, to the said Lady Dowager *Shelburne* and Lord *Charles*, their executors, administrators or assigns, or either of them.

This lease, by assignment, became afterwards vested in *Nicholas Biddulph*, the respondent's grandfather, to whom the said *Charles* Lord *Shelburne*, by indenture, dated the 25th of October, 1694, also granted the towns and lands of *Rathrobbin*, *Curragh* and *Bredagh*, with other lands lying in the barony of *Ballyboy*, in the King's county, to hold to him, his heirs and assigns, for the life of *Charity Biddulph*, wife of *Nicholas* the lessee, *Francis Biddulph*, his son and heir (father of the respondent) and *Alice Biddulph*, eldest daughter of *Nicholas* the lessee, and the life of the survivors and survivor of them, and for and during the life and lives of such person or persons as by virtue of the said deed, should, from time to time, successively and for ever be added thereto, at the yearly rent of eighty pounds ten shillings and sixpence for the first six years, and the yearly rent of a hundred and three pounds three shillings and ten pence, for the remainder of the term. And there was a covenant on the part of *Charles*, Lord *Shelburne*, his heirs and assigns, for a perpetual renewal of this

lease, by inserting a new life, in the room and stead of every life which should fail, from time to time, upon the lessee, his heirs and assigns, paying half a year's rent (according to the respective reservations therein contained, for that half year wherein such life should so cease or fail) over and above the annual rent reserved, and nominating a new life within twelve months after the failure of each of the lives then in being, or to be afterwards nominated.

Another like lease was granted by *Charles* Lord *Shelburne*, by another indenture, dated the 10th October, 1695.

Charles Lord *Shelburne* died in April 1696, without issue and intestate; and upon his death, *Henry* Earl of *Shelburne*, his brother and heir, possessed his personal estate, and became intitled to several estates of the yearly value of one thousand pounds and upwards, of which Lord *Charles* died seised in fee-simple, and which descended to the earl as his brother and heir at law. And he claiming title to the inheritance of the several estates comprised in the before mentioned leases, (subject to the jointure estate of the dowager Lady *Shelburne*, in part of the lands) received the rent reserved upon those leases from time to time, as they became due; and in Easter term, 1697, the earl levied a fine with proclamations, of the said demised estates. Afterwards, by indentures

of lease and release, dated the 15th and 16th of April, 1697, in consideration of a marriage then intended, and which afterwards took effect, between the Earl and *Arabella Boyle*, and of her portion, Lady *Shelburne* and the earl limited and conveyed the estate comprised in the said leases, and the other estates which had descended to the earl, as heir of his brother, to the use of the earl and his heirs, till the marriage; and after the marriage, to other uses; with a covenant for enjoyment free from all former incumbrances; other than and except the several leases then in being thereof, under the several rents thereon respectively reserved.

On a bill filed for specific performance of the covenant for renewal, the court declared their opinion, that the respondent was intitled to renewals of the three leases in the pleadings mentioned, according to the covenants in the said respective leases, upon payment of the rent and arrears and fines, with interest; and that upon payment of such rents, arrears, and fines, with interest, leases should be respectively granted by the appellants, for the lives in the bill mentioned, according to the covenant of renewal for ever.

From this decree there was an appeal, and on behalf of the appellants it was argued, that tenant in tail at law, independent of the

statute of 32 Hen. 8. had no right to make a lease absolutely to bind the issue in tail, and much less the remainder-man, and that even by that statute, a tenant in tail has no power to grant leases to bind those in remainder; and therefore the leases in question were absolutely void as against the appellant, Earl *Henry*, who did not claim under Lord *Charles*, or as issue in tail, but as remainder-man. It was argued that it might be objected, that Lord *Charles*, who granted the leases, was tenant in tail, with remainder to the earl in tail, and a reversion to Lord *Charles* in fee; that therefore not only the estate-tail was bound, but the reversion also; and as the earl had by fine destroyed the estate-tail, in order to acquire an absolute power over the estate, the prior grants of Lord *Charles* should take place of any subsequent uses by Earl *Henry*, and would therefore bind the estate in his hands.

But to this it was said to be an answer, that the estate-tail out of which the leases first arose being spent, and the earl not claiming under it, but by a distinct limitation to himself in tail male, his fine could not let in Lord *Charles's* leases upon that estate, which came in lieu of the earl's estate-tail; nor could it, by consolidating the two estates, let them in upon the reversion; both because the earl acquired a new estate, and because the uses of the fine were never declared to

him in fee, but directly to the uses of the settlement; by which, in consideration of his own marriage, the earl had an estate for life only, with remainder to his first son, (the other appellant;) and these estates arose and were granted out of the estate-tail, which the earl had before the fine, and not out of the reversion. But even if the fine did let in the leases, the most that could be insisted on was, that it let them in during the continuance of those leases only, and could not extend to leases not then in being: for there could be no ground of equity to carry it farther, and make the fine give them a greater benefit than the law gives them; which is the mere legal effect of an act done for another purpose, and by accident only turns to their benefit, without any precedent right to it, or any consideration for it; and therefore, with respect to the respondent, totally voluntary. It was said, it might also be objected that in the settlement made by Earl *Henry* there was an exception of the leases; and consequently this must establish them, and every covenant in them. To this it was alleged to be an answer, that Earl *Henry* at that time, which was very soon after the death of his brother, had no notice of these leases; but there being many upon the estate, it was a prudent caution in the covenant against incumbrances, to except the leases; by which, however, nothing more was intended, than to secure the covenantor against

any breach of covenant, or any loss or damage that might ensue therefrom. But there could be no ground for insisting, that the exception in the covenant should establish or confirm the leases, any otherwise than so far as they were good and available in law ; and much less that the respondent, or those under whom he claimed, who were no parties to the settlement, nor gave any consideration for this benefit, had a right to come into a court of equity, to have the benefit of this exception, or any supposed agreement implied in it, in their favor. On the other side it was contended, that by the fine which Earl *Henry* levied in 1697, the estate-tail limited in remainder to him by the settlement of 1679, was barred and extinguished, in the same manner, to all intents and purposes, as if he was dead without issue; and the reversion in fee, which descended to him as heir of Lord *Charles*, immediately took effect in possession; and as the new uses in the marriage settlement of 1697, arose out of that reversion in fee, they were therefore subject to all antecedent incumbrances and engagements which could affect that reversion. That as this reversion in fee, after it had taken effect in possession by means of the fine, was specifically bound by the covenants for perpetual renewal; and as such covenants are considered as real agreements, and go with the land, so they are in their nature proper for a specific per-

formance, and will in equity affect the legal interest of all those who take the estate with notice of them. That all those claiming under the settlement of 1697, had notice of these leases and covenants, and were as much bound by an equitable lien upon the lands, as Earl *Henry* himself; especially in favor of lessees who had made very great improvements, and were therefore to be considered as purchasers of the right of renewal.

After hearing counsel on this appeal, the following question was put to the judges; viz. whether by the fine levied by the appellant, Earl of *Shelburne*, in Easter Term, 1697, the reversion in fee of the estate in question was let in, subject to the leases in question made by *Charles* Lord *Shelburne*, and the covenants therein contained for a perpetual renewal? And the Lord Chief Justice of the King's Bench, having delivered the unanimous opinion of the judges to this effect, viz. that the leases for lives then in being were good and effectual, as being served out of the reversion in fee which Lord *Charles* had when he made them, and which was then in Lord *Henry*; and that the covenants for renewal were binding on Lord *Henry*, as a lien on the same reversion, which he had let in by barring, discharging, and extinguishing his estate-tail: it was ordered and adjudged, that the appeal should be dismissed, and the decree therein complained of affirmed.

A point existed in this case which seems

to have escaped notice. When the estate-tail of Lord *Charles* determined, the leases were determined as against the remainder-man, as owner of the remainder, and subsisted only as against him, as the owner of the reversion in fee. The estates granted by the leases, therefore, were mesne estates between the estate-tail of Earl *Henry* and his reversion in fee, and this interposed estate did in point of law keep the estate-tail, of Earl *Henry*, and the determinable fee derived from his fine distinct from the reversion in fee, and ought on principle to have been considered as a protection against merger, and consequently to have suspended the operation of the leases, and of the covenant for renewal, until the estate-tail of Earl *Henry* was spent, and to have left him at liberty to have suffered a recovery, to enlarge his estate-tail into a fee-simple, and bar the reversion in fee, and the leases and covenants for renewal as depending on the reversion.

The suit, however, was only for the performance of the covenant for renewal. That covenant was treated as attaching on the inheritance as if accelerated by merger; without regarding the intervening terms of years which prevented the merger: so that the title under the leases might, for the purposes of enjoyment, have been suspended while the title under the renewals was in operation.

And in *Kinaston v. Clarke,* (*a*) " *Thomas*
" *Delahay* on his marriage settled his estate
" on himself for life, on his wife for life, re-
" mainder to trustees to preserve contingent
" remainders, remainder to his first and every
" other son in tail male, remainder to himself
" in fee; and there were issue a son. *Thomas*
" the father died indebted by bond, the son
" died afterwards without issue, but by his
" will had devised the estate to the defend-
" ant *Clark* in fee."

And Lord *Hardwicke,* after treating the reversion in fee, as chargeable with the debts by specialty, observed, " indeed the son
" might have suffered a recovery, and bar-
" red the reversion in fee, and then the fa-
" ther's creditors would not have come in; if
" he had levied a fine only, it would have
" barred the estate-tail, but the reversion
" in fee would have been liable."

The cited cases (*b*) fully establish the position that an estate-tail when it no longer retains the quality of being descendible to the issue, may merge. (*c*) But it can merge in those cases only in which the fee arising from the estate-tail, and the fee immediately expectant on that estate, meet in the same person. By suffering a common recovery, the tenant in tail may enlarge his

(*a*) 2 Atk. 206.

(*b*) See Perk. 88.

(*c*) Walsingham's Case, Plow. Com. p. 547. on the principal point: this case is not law at this day.

estate-tail into a fee-simple, and destroy all remainders expectant on the estate-tail, and even the remainder or reversion in fee, if any, in himself. The operation of a fine is not equally extensive. Its effect, when it does not cause a discontinuance, (and tenant in tail who has not the immediate remainder or reversion cannot create a discontinuance,) is confined to the estate-tail: when levied by tenant in tail without effecting a discontinuance, it may be a conveyance of the fee; but it cannot destroy the reversion or remainder: on the contrary, when an estate-tail, and the remainder in fee, immediately expectant on that estate, are both in the same person, the effect of the fine is to take from the estate-tail, the quality of descending to the issue, and the time comprised in the estate-tail is annihilated in the time of the remainder or reversion in fee; and the right of possession under the remainder or reversion in fee is accelerated, and the estate-tail, and the time of that estate, become extinguished. Under these circumstances, the estate in reversion or remainder gives the right of more immediate possession. All persons who have any claims on that reversion or remainder, as a distinct interest from the estate-tail, will gain the advantage of this acceleration of the estate, to the prejudice of the tenant in tail. This is obvious from the decision in *Shelburne and Biddulph.*

Tenants in tail frequently involve them-

selves in the consequence of merger, by levying a fine instead of suffering a common recovery. It may be stated, as a point of prudence never to be disregarded, that no tenant in tail who has the fee by descent, from his father or other ancestor, should ever levy a fine. By attempting to avoid the difference of expence, and which is inconsiderable, he may involve himself in all the incumbrances of his ancestor. He also renders the deduction, and the evidence of his title, more difficult. A purchaser or a mortgagee must be satisfied that he had a good title to the fee as well as to the estate-tail; and an inquiry must be made into the acts done by the ancestor, and the incumbrances which affect the reversion or remainder. A recovery suffered by the tenant in tail supersedes the necessity of considering the title to the reversion or remainder. For the reversion or remainder being barred by the operation of the recovery, the acts done by the different owners of this estate are immaterial to the title; they cannot affect the lands in the hands of the tenant in tail, or the alienee under the intail. His recovery has over-reached the right of the reversioner, and remainder-men, including himself if he be a reversioner or remainder-man, and entirely defeated their estates. On the title therefore of the tenant in tail to the estate-tail, will depend the future title to the fee-simple, because the estate-tail which was in him, has

been enlarged into a fee-simple, while in those instances in which tenant in tail with the immediate reversion or remainder in fee in himself levies a fine, and, by that means, extinguishes the time of the estate-tail in the remainder or reversion in fee, the validity of the title will depend on the right which the tenant in tail can shew to the several estates; for unless he had a good and clear title to the estate-tail, and also to the reversion or remainder in fee, and unless both estates were free from incumbrances, his title to the fee-simple will be exposed to objection.

On the priority of estates granted by the tenant in tail, and by the reversioner or remainder-man, before that reversion or remainder came into the hands of the tenant in tail; and also on the manner in which charges created by those persons will affect the ownership, in the hands of those who claim under the fine; some remarks will be offered when the consequences of merger, as between strangers and those who have estates carved out of the several estates, which merge, and occasion the merger, are considered. The cases of *Errington v. Errington*,(*a*) and *Symonds v. Cudmore*,(*b*) and *Shelburne v. Biddulph*, (*c*) are interesting on this point.

(*a*) 2 Bulstr. 42.
(*b*) 4 Mod. 1.
(*c*) 4 Bro. Cases, 594.

Of the Exceptions and Privilege from Merger, under the Construction which the Statute of Uses has received.

Other instances of exemption from merger arise *at law*, from the statute of uses. (*a*) Before that statute was passed, uses were interests, arising merely from a right in equity, to the beneficial ownership ; and not from any estate or dominion recognized by the law. The tenant of the legal estate, was a trustee for the person intitled to the use.

When uses were of this fiduciary nature, it frequently must have happened that a legal estate was conveyed upon trust for another person, who was previously the owner of some estate, immediately preceding and susceptible of the operation of merger. As often as this circumstance occurred, the legal estate of the trustee merged by the rules of law; and the right of possession under the estate conveyed to him, to uses, was accelerated. The court of Chancery, which alone could compel the feoffee to uses to perform the trust reposed in him, protected the interest of the trustee ; and, by its rules, provided that he should not experience any prejudice by his agreement to be-

(*a*) 27 Hen. 8. c. 10.

come the trustee. Therefore it would not allow the *cestui que use* to call for a conveyance of the legal estate, till the *time* of the esta t of the feoffee to uses, which he had prior to the conveyance to uses, was expired, or by means of a feoffment on condition, or of a reconveyance or a demise, or by some other means, the trustee was placed in the like situation in point of benefit, as he stood before he accepted the conveyance to uses.

The precise means by which, under these circumstances, the court of Chancery administered relief to the feoffee to uses, is not known. Nor is the knowledge of the practice of the court, very material. For the present purpose, it is sufficient to be satisfied that this court would not suffer the *cestui que use* to derive any advantage, or the trustee for supporting the uses to sustain any prejudice, as a consequence of the conveyance to uses; that, in point of law, there were several means by which the several parties might be placed in that situation which was agreeable to equity, and consistent with the nature and extent of their several rights.

Such was the situation of the parties when the statute for transferring uses into possession was passed into a law. The scope and the object of that statute were to change equitable interests into legal estates, and to distribute the legal estates among those who were intitled to the equitable ownership, in

the same proportions, and for the same periods of time, and under the same restrictions, as they were intitled to that ownership.

For this reason that statute, after enacting that where any person or persons stand or be seised, or at any time hereafter shall happen to be seised of and in any honors, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence or trust, of any other person or persons, or of any body politic by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner of means, whatsoever it be, that in every such case, all and every such person and persons, and bodies politic that have or hereafter shall have any such use, confidence, or trust, in fee-simple, fee-tail, for term of life or of years, or otherwise, or any use, confidence or trust, in remainder, or reversion, shall from henceforth stand, and be seised, deemed and adjudged, in lawful seisin, estate and possession of and in the same honors, castles, manors, lands, tenements, rents, services, reversions, remainders, and hereditaments, with their appurtenances to all intents, constructions and purposes in the law of and in such like estates, as they had or should have in the use, trust or confidence of or in the same; and that the estate, right, title and possession, that was in such person

or persons, that were or thereafter should be seised of any lands, tenements, or hereditaments, to the use, confidence or trust, of any such person or persons, or of any body politic, be from thenceforth clearly deemed and adjudged to be in him or them, that had or thereafter should have such use, confidence or trust, after such quality, manner, form, and condition as they had before in or to the use, confidence or trust that was in them.

And also enacting that where divers and many persons were or thereafter should happen to be jointly seised of and in any lands, tenements, rents, reversions, remainders or other hereditaments, to the use, confidence or trust of any of them that were so jointly seised, that in every such case that the person or persons which had or thereafter should have any such use, confidence or trust in any such lands, tenements, rents, reversions, remainders or other hereditaments, should from thenceforth have, and be deemed and adjudged to have only to him or them, that had or thenafter should have such use, confidence or trust, such estate, possession of and in the same lands, tenements, rents, reversions, remainders, and other hereditaments, in like nature, manner, form, condition, and course as he or they had before in the use, confidence or trust, of the same lands, tenements, hereditaments; introduces an exception, (saving and reserving to all and sin-

gular persons, and bodies politic, their heirs and successors, other than those person or persons which was or were seised or thereafter should be seised of any lands, tenements, hereditaments to any use, confidence or trust) all such right, title, entry, interest, possession, rents, and action, as they, or any of them had, or might have had, before the making of that act; and with a further exception, (and which is most material to the subject of this essay) saving and reserving to all and singular those persons and their heirs, which were, or thereafter should be seised to any use, all such former right, title, entry, interest, possession, rents, customs, services and action, as they, or any of them, might have had *to his or their own proper use*, in, or to any manors, lands, tenements, rents, or hereditaments, whereof they were, or thereafter should be seised to any other use, as if that present act had never been had nor made.

The case of *Cheney*(*a*) first came before the court, at least it is the first case of which we have any report upon this provision of the statute. *Cheney* made a lease for years to *Oxenbridge* and *Scott*, on a secret confidence for advancement of the wife of *Cheney*; and afterwards he made a feoffment to

(*a*) 4 Leon. 234. Moor, 196. pl. 345.

Oxenbridge and others to certain uses. And the question was, if the term were extinct by the feoffment; and it was decreed in the Exchequer by the advice of *Wray*, *Anderson*, and *Manwood*, that the term was not extinct. This was *by reason of the proviso in the statute* of uses,(*a*) which saves all the interests which feoffees have to other uses, or have *in the land to their own use;* and because *Oxenbridge* had this term *to his own use*, it is not extinguished by the feoffment, which he took to the use of another person.

This provision of the statute extends to all cases in which a conveyance is made *to any person* for the purpose of raising uses, on the estate conveyed to that person. All the cases which have arisen on this statute, as well as the words of the statute itself, prove that there is an exemption from merger under this statute, in those instances only in which the owner of the term, or particular estate, is the instrument mediately or immediately for raising the uses, so that the uses are to arise out of the estate conveyed to him. For even at this day an estate arising to a feoffee to uses under a declaration of uses, will merge an estate previously vested in such feoffee to uses. Also when a man has a term, or other particular estate, in his own right, and the reversion or remainder is conveyed to him upon trusts

(*a*) 27 Hen. 8.

which do not execute into estate by force of the statute of uses, the legal right under the term or other particular estate, will be extinguished. This will be in consequence of the doctrine of merger. For the like reason it seems that when a termor joins with those who have the reversion in making a conveyance to a third person, either to uses or upon trusts, and although there be an express declaration, that the conveyance shall not affect the right of the termor, his estate will be annihilated. The only mode of keeping his estate on foot, is to insert an express declaration of use, by way of confirmation in his favor. And then there is rather a new term under a new title, than the old term, under the antient title. The only ground of contending for the continuance of the term in the absence of such declaration, is, that the agreement that the term should continue amounts to a declaration of the use. Also when the conveyance is by several instruments, and they are all made with a view, that the uses may arise, when these instruments are completed, the several instruments will be considered *as several parts of the same assurance;* and although some of the instruments give to the party, an estate which must remain with him, till the other instruments begin to operate; yet this case is within the equity of the exception in the statute; as often as all

the objects in the contemplation of the parties, and to be attained through the medium of these instruments, is to raise the uses. This will appear from the following cases.

In *Sir John Ferrers and Sir John Curson v. Sir Richard Fermor and others, John Poory* let lands for twenty-one years, rendering two hundred pounds per annum. Afterwards it was covenanted by indenture between the *lessor, lessee and others,* that a bargain and sale should be made, and a fine levied to the use of the lessee, and to others and their heirs, to the use of them and their heirs, to the intent that a *common* recovery should be suffered against the conusees, with voucher of the lessor, who should vouch the common vouchee, to the use of the plaintiffs, and their heirs. The bargain and sale was made by deed inrolled, and a fine was levied. In the next term the recovery was suffered. On an action of debt, brought for two years rent due from the lessee, it was agreed by counsel on both sides, and by all the court, that if a fine or feoffment, be to lessee for years to the use of a stranger, it shall not extinguish the term, but it is saved by the statute of 27 Hen. 8. which executes the possession according to the use, *and saves all rights, estates, and interests;* and as at the common law, if a termor take an estate to

(a) Cro. Jas. 643.

uses, he shall not be compelled in equity to execute the estate, but his term shall be saved to him, so the statute does not intend to prejudice such as have estates, but to preserve them; but here the doubt was because by the fine levied, and bargain and sale made to the use of the lessee himself, and others *for a time*, to the intent that a recovery should be suffered, the term being drowned and extinct *for the time* until recovery suffered, whether it should now be revived. And all the court resolved that it was revived; for the bargain and sale, and the fine and recovery, they said, *were all but one assurance*; and the recovery being executed which was grounded on the covenant, was *quasi* a conveyance to the use *ab initio*; and was therefore within the equity and intention of the saving in the statute, and was all one in judgment of law as a feoffment to an use; and they resolved that the term was not expired [read extinct] but that both *term* and *rent* were revived.

In another case (*a*) it was said, that if a lessee for years be made tenant to the præcipe for suffering a common recovery, that doth not extinguish his term, because it was in him for another purpose. To which the whole court agreed.

From these cases it may be inferred that if a person who has an estate-tail with a remain-

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(*a*) Fountain v. Cook, 1 Mod. 107.

der or reversion in fee *by descent* levy a fine, or make a lease and release, and levy a fine for the purpose of suffering a recovery, and the recovery be suffered, though the fine singly, *or the lease and release and fine*, would have occasioned a merger, and annihilation of the time of the estate-tail, so as to accelerate the right of possession under the recovery, yet the recovery will be construed part of the same assurance; so that the title will depend wholly on the ownership of the estate-tail, independent of the remainder or reversion in fee; and all charges and incumbrances which depend for effect on the reversion or remainder will be excluded. But to bring the case within this rule, it should seem the *recovery must be part of the arrangement of the original assurance*, and that the recovery, as a substantive independent act, cannot produce this effect: in short, the effect of separation, after a consolidation of the two estates under the fine, or under the lease, release, and fine, as a *distinct* assurance, completed before the recovery was contemplated; for a merger which has once taken full effect, cannot be defeated by any attempt to revive the title under the estate-tail, and to enlarge the ownership, under the estate-tail, into a fee-simple, in exclusion of those who have acquired rights under the reversion or remainder in fee, as accelerated by merger.

On the Exemptions from Merger, in Favor of Joint-tenants, and of contingent Remainders.(a)

Nor will the doctrine of merger have effect in those instances in which the several interests are limited *by the same deed or instrument*, or take effect in *the same instant of time*, and in some degree, by *the same act*; and, (for this is an important circumstance,) some other person is concerned in the consequence of the merger, and the merger, if it took place and were absolute, would either alter the quality of one of two estates in the *same person*, or destroy a remainder intended for *another* person.

That this ground of exemption from merger may be allowed, the circumstances which must concur are:

1st, The several interests must be limited by the same deed or instrument, or take their effect in the same instant of time, and in some degree by the same act. (b)

When several estates are limited by different deeds, or the estates commence at different times; or although they commence in point of title in the same instant of time they are afterwards so derived that the title

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(a) Purefoy v. Rogers, 2 Saund. 386.
(b) Lit. § 283. 1 Inst. 181. b. Rogers v. Downes, 2 Mod.

to one estate or interest, depends on one deed or instrument, and the title to the other estate or interest depends on another deed or instrument: or if a will take effect, and a descent from the testator take place in the same instant of time, and the estate under the will, and the estate under the descent, come into the tenancy of the same person, so that one of these estates is an accession to the other at a different time, then there will be a merger. The application of these positions will be shewn partly in the additional observations under this head of division, and partly in considering the consequences of merger, as to joint-tenants, and also as to the persons intitled to contingent remainders of freehold interest. In this place it is to be remembered that for all the purposes of merger, and for most other purposes a will, and a codicil to that will, are parts of one and the same assurance.

2dly, Some other person must be concerned in the consequence of merger.

Without the concurrence of an interest, in some other person, to be affected by the merger, no reason for the exemption would exist; nor would the exemption be allowed. This is manifest from the case already stated of several limitations to the same person; one for the life of a stranger, the other for the life of himself; and the authorities which establish the proposition, that the prior estate for life will merge in

the more remote estate for life. It is also elucidated by the case stated from Lord *Coke*, of a lease to a person for years, and a further limitation by way of remainder, to the *same* person for life. Under these circumstances it is clearly settled, that the estate for years will merge in the estates for life, notwithstanding the several estates are created by the same deed, and derive their effect from an act taking effect in the same instant of time. That no privilege from merger is allowed in those cases, is owing to the circumstance that no person except the owner of those several estates, would be prejudiced by the merger. For when some other person is in a legal point of view, as distinguished from equity, concerned in interest; or the quality of the estates would be altered, or a contingent remainder would be destroyed, *then and then only*, the law applies the exception, and suffers the several interests to remain distinct, or exempt from absolute and positive merger; (*a*) at least until the interests of those other persons are determined, or by some other means fail of effect.

The examples and the authorities, which will be introduced in elucidation of this point, will prove the existence of this distinction, as far as general principles and a series of decisions can establish the law on any subject.

It is observable, however, that though

(*a*) Com. Dig. Est. B. 15.

the several interests will remain distinct for the purpose of preserving the quality of an estate, in favor of a joint-tenant, or supporting a contingent remainder, (*a*) yet as soon as the joint-tenancy ceases, or is severed, or the contingent remainder becomes incapable of effect ; or having taken effect is determined, the two estates which were kept distinct for this particular purpose, *will unite inseparably, and form one single, connected, and entire estate.*

To some purposes, indeed, the two estates may unite, notwithstanding a contingent remainder is interposed between them ; and although, for the purpose of supporting the contingent remainder, the particular preceding estate is considered distinct from the more remote estate, vested in the owner of the particular estate; yet unless the contingent remainder becomes vested in interest, the person who is the owner of the several estates, will be treated as seised of the inheritance from the first instant ; and, in the mean time, till the contingency arises, as having a *qualified* seisin of the inheritance, and such seisin will entitle him to all the remedies and privileges of the owner of an immediate estate of inheritance, (*b*) as distinguished from the tenant

(*a*) 1 Inst. 181. b. 182. a.

(*b*) See also Purefoy and Rogers, Hooker v. Hooker, Ess. on Estates, in the chapter on Curtesy.

of the mere freehold, having a particular estate. The case of *Lewis Bowles*, already cited, illustrates this doctrine. When two estates immediately expectant on each other meet in the same person, and the estate in possession is in extent, inferior to the estate in remainder or reversion, the estate in possession will merge. It is not positively necessary, that there should be an accession of one estate to another, by different acts or at different times. An instance, in which the accession of the reversion makes a difference, is, when there is an intervening remainder, and that remainder is contingent. Under these circumstances, such accession alone will not occasion a merger, to the destruction of the contingent remainder. There will be a temporary union and consolidation of estates, leaving an opening for the contingent remainder, when it can vest in interest. (*a*)

3dly, That the exemption is allowed in those instances only which would either alter the quality of one of two estates, in the same person, or would destroy an estate, intended for some other person, is now to be proved.

And first, that it would alter the quality of one of two estates. This branch of the

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(*a*) Lewis Bowles's case, 11 Rep. 80.

exemption provides for the case of joint-tenants; and it may be stated as a clear and distinct proposition, that where two estates are limited to one person by the *same* deed or instrument, and that person has one of these estates *jointly with another person*, or by *entireties with that person*, there will not be any merger as long as the joint-tenancy continues.

This distinction may be even traced in the writings of the revered *Littleton*: (*a*) his language is, "Also, there may be some "joint-tenants, which may have a joint-"estate, and be joint-tenants, for term of "their lives, and yet have several inheri-"tances. As if lands be given to two men, "and to the heirs of their two bodies begot-"ten, in this case the donees have a joint "estate for term of their two lives, and "yet they have several inheritances; for "if one of the donees hath issue and die, "the other who surviveth shall have the "whole by the survivor for term of his life; "and if he that surviveth hath also issue and "die, then the issue of the one shall have "the one moiety, and the issue of the other "shall have the other moiety of the land, "and they shall hold the lands between "them, in common, and they are not joint-"tenants, but are tenants in common.

(*a*) Litt. § 283.

" And the cause, why such donees in such
" case have a joint-estate for term of their
" lives, is, for that at the beginning the
" lands were given to them two, which
" words, without more saying, make a
" joint-estate to them for term of their
" lives. For if a man will let land to ano-
" ther by deed or without deed, not making
" mention what estate he shall have, and of
" this make livery of seisin, in this case the
" lessee hath an estate for term of his life;
" and so in as much as the lands were given
" to them, they have a joint-estate for
" term of their lives. And the reason why
" they shall have several inheritances is
" this, inasmuch as they cannot by any
possibility have an heir between them
" ingendered, as a man and woman may
" have, &c. the law will that their estate
" and inheritance be such as is reasonable,
" according to the form and effect of the
" words of the gift; and this is to the heirs
" which the one shall beget of his body,
" by any of his wives, &c. so as it behoveth
" by necessity of reason, that they have
" several inheritances. And in this case
" if the issue of one of the donees after the
" death of the donee die, so that he hath
" no issue alive, of his body begotten, then
" the donor or his heir may enter into
" the moiety as in his reversion, &c.
" although the other donee hath issue alive,

" &c. And the reason is, forasmuch as the
" inheritance be several, &c. the reversion
" of them in law is several, &c. and the sur-
" vivor of the issue of the other shall hold
" no place to have the whole."

And in commenting on the text of this section, Lord *Coke* observes, that, " albeit " the donees have several inheritances in " tail and a particular estate for the lives, " yet the inheritance *doth not execute*, and " so break the joint-tenancy ;" and he concludes, as *Littleton* had done, that " they are " joint-tenants for life, and tenants in com- " mon of the inheritance in tail." And in one of the resolutions in *Wiscot's* case, already cited, (*a*) (a cause between *Giles* plaintiff, and *Wiscot* defendant, and to be cited more fully for another point, and as furnishing a distinction,) it was agreed that where the fee is limited by *one* and the same conveyance, there one may have the fee-simple, and the *other an estate for life jointly* with him. The instance given as an example was of an estate to three and the heirs of one of them; and it was said one of them had the fee-simple, and yet the jointure doth continue ; for all is but *one entire estate* created at the same time ; and therefore the fee-simple cannot drown the jointure which took effect with the creation of the remain-

(*a*) Wiscot's case, or Giles v. Wiscot, 2 Rep. 60.

der. Of this example of the estate to three, and the heirs of one of them, it was said he who had the fee could not grant over his remainder, and continue in himself an estate for life.

The reasoning which adduces this point of difference is larger than the example to which it is applied. The example and the observations on the same are of a fee connected with an estate for life; and forming one entire and inseparable interest.

Notwithstanding the peculiarity of the instance selected for the example, (*a*) the general principles, and even the authorities, appear to afford sufficient ground for extending the exemptions from merger to the cases of *estates* perfectly distinct. All the industry of the author has not enabled him to discover a single authority to the contrary: and all the cases and examples which are given of merger of estates held in joint-tenancy, are confined to joint-tenancy arising under one deed, and the ownership or accession of another estate under another deed.(*b*)

Perhaps, an exposition may be given to the observation of Lord *Coke*, which will make it correspond in application, as it pro-

(*a*) Barker v. Gyles, 2 P. W. 280. Rogers v. Downs, 9 Mod. 292.

(*b*) 1 Inst. 181. b. 182. a.

bably did in meaning, with the difference which has been urged. It may be contended, that his conclusion, drawn from the example of *Littleton*, is only that *for the purpose of merger* there are not several estates to drown one in another, though the estates are several for the purpose of alienation, &c. Even under these circumstances, and those discussed in a former page, the reader will see the propriety of forming his opinion with caution, and treating this point as at least doubtful.

In pursuing the observations to be made under this head or division, the contrasted cases of several estates taken under different deeds or instruments, or in different instants of time, will be introduced.

Whatever may be the real state of the law on this point, all the reasoning on the cases applies with equal force, to the instance of two estates existing separately and distinctly under the same instrument, provided one of the estates be held in severalty, and another of them be held by the same person as one of several joint-tenants.

Even Lord *Coke* may be understood in a more limited sense, than his words, in their utmost latitude, import.* The estates may be several for the purposes of *alienations*, though they are not several, either for the purposes of *merger*, or with a view to the remedies to which the parties may re-

sort when strangers interfere with their rights.

Perhaps, it is not going too far to offer the conjecture that there will not be any merger, even when the estates are in the first place clearly and completely distinct; and that relation, on which alone merger can operate, arises from the determination of an intervening estate. Thus, suppose lands to be limited to A. and B. as joint-tenants, remainder to C. in tail, remainder to A. in fee, and C. to die without issue. There is great reason to contend that the joint-tenancy will continue, notwithstanding these estates were clearly distinct; and distinct so far that one might have been aliened and the other retained. (*a*)

In *Goodtitle* v. *Billington* (*b*) there was a devise to *Elizabeth Cheval*, the testator's wife, and *Ann Cheval* his daughter, for and during the term of their natural lives, and the life of the longer liver of them, in equal proportions, share and share alike.

But in case his said daughter *Ann Cheval* should happen to marry, and have issue of her body, lawfully begotten, then, and in that case, after the decease of his said wife, he the testator gave and devised all and singular the said messuage, &c. unto his said daughter, *Ann*

(*a*) See Marquis of Winchester's case, cited p. 70. and King and Edwards, cited p. 71.

(*b*) Doug. 753.

Cheval, and to her heirs and assigns for ever. But if his said daughter should happen to die single and unmarried and without issue of her body lawfully begotten, then and in that case he gave and devised all and singular the aforesaid premises unto his said wife *Elizabeth Cheval* and to her heirs and assigns for ever.

It seems to have been admitted that the wife and daughter were joint-tenants for life; and it was decided that the devise over, gave a contingent remainder in fee, and did not operate by executory devise. During the argument by *Graham*, one of the counsel, Mr. Justice *Buller* observed, that if *Ann Cheval* had married, and had issue, her life estate would not *have merged*, as had been contended by *Graham*. The reason assigned by Mr. J. *Buller* was, that the remainder was not limited to take effect till the death of the wife. With all deference to the opinion of that great lawyer, and with all the respect which is felt for every thing he delivered from the bench, it is submitted that a better and more satisfactory reason, to have been assigned, was that the estate for life and the remainder were limited by the same instrument; and by the scope of the deed the remainder was to take place, in subordination to the estate for life, and to the quality of that estate as held in joint-tenancy.

Without recurring to this mode of reasoning, it is difficult to reconcile the opinion that the estate for life would not have merged in the remainder in fee, when that remainder was vested; for from all the cases on merger it seems to be a necessary conclusion, that the particular estate would have united with the remainder, and been annihilated in that estate, unless the quality of the particular estate, and the interest of the joint-tenant, arising from that quality, had been involved in and influenced the question.

The argument of *Graham*, was, that as soon as the daughter had married and had issue, the estate to her and her heirs would have enlarged her interest, and merged her estate for life. The observation of Mr. Justice *Buller*, therefore, most probably applied to the mode in which the devise over was to operate, and the time at which it was to take effect. The scope of his observation probably was, that the devise over was by the form of the limitation to take place *after the particular estate*, and not in exclusion of that estate; and the reference to the doctrine of merger, was only an answer to the terms, in which *Graham* had delivered his argument. Even the ground of Mr. *Graham's* argument did not apply to the doctrine of merger. It applied to executory devises, and their operation to over-reach

and defeat an estate previously limited by the same instrument; for estates defeated by executory devise, are determined by limitations, while estates annihilated by merger, cease to have continuance, notwithstanding the period of their duration is not completed; so that estates determined or defeated by executory devise, are determined by an intention, giving effect to the limitations, while estates determined by merger, owe their determination to the mere act and operation of law. These observations may obviate the difficulty which might otherwise arise in the mind of the reader in applying the argument in *Goodtitle v. Billington.* (a)

Without the least dependance, however, on the enquiry to be made on the point already considered, it is clear that when there are two estates, *and both* are limited in joint-tenancy; as to A. and B. for life, remainder to the heirs of their bodies, or their heirs, so that they *hold both estates* in joint-tenancy, or by entireties; the doctrine of merger is applicable; for the reason of the exemption, in a case with these circumstances, does not exist, inasmuch as the joint-tenancy or tenancy by entireties extends as well to one of these estates, as to the other of them.

2dly, That it would destroy a contin-

(a) Dougl. 753.

gent interest intended for some other person. From a variety of cases affording authoritative decisions on this point, it is to be collected, that when two estates commence, or take place, in the same instant of time, they will not exclude a contingent interest, limited to commence after one of these estates, and before another of them. This is equally true when the more remote estate is created by the deed or instrument, by which the former of these estates is limited, as when the former of these estates, and also the contingent interest, are severally limited by will, and the more remote of these estates is derived by a *descent*, completed in the same instant of time in which the will takes effect.

In *Plunket* v. *Holmes*, A. was tenant for life, with remainder in contingency, and A. was the heir of the testator, who by his will created the estate for life and the remainder. (*a*)

And it was ruled and resolved by the whole court, that although *Thomas*, the tenant for life, had the reversion in fee, by descent, this descent did not merge his estate for life, contrary to the express devise, and the intent of the devisor, but left an opening for the interposition of the remainder, when

(a) 1 Lev. 111. Sir Tho. Raym. 28.

it should happen, to interpose between the estate for life, and the fee.

In *Boothby* v. *Vernon*(a) the like circumstances concurred, and though the estate for life, and the fee united, yet as at the death of the wife, the several estates were separated by the remainder which vested at the death of the wife, it was held that the surviving husband was not, although the remainder was determined, intitled to be tenant by the curtesy.

And by the court; (b) "Upon the death "of the wife, the contingent estate-tail to "her issue began; so that, at that time the "estate was to commence in possession, "and be consummate, because her estate "for life, by which it was to be supported, "was gone; so that the inheritance being "never vested in her during her life, for "that reason her husband cannot be tenant "by the curtesy. And to make this more "clear, the intention of the testator is to "be considered. Now it doth not appear, "that he had any manner of intention that "his sister should have any benefit of the "inheritance: if he had, then certainly he "having the whole dominion over his estate, "and who could have moulded it as he "thought proper, would have shewed, that he "intended she should have the inheritance;

(a) 9 Mod. 147.
(b) 9 Mod. 150.

" but there is not the least sign or badge of
" any such intention; and if it shall be
" otherwise intended by operation of law,
" that would be an injury done to the in-
" tention of the testator. Wherever the
" estate is to be determined by express limi-
" tation or condition, upon the death of the
" wife, there the husband shall not be tenant
" by the curtesy: as where an estate for life
" is limited to a woman, with remainder
" to her first and every other son in tail
" male, remainder to the heirs of her body,
" remainder to her right heirs; here it is
" plain, that she is seised of the inheritance;
" yet if she hath a son, her husband shall
" not be tenant by the curtesy, because
" the contingent estate which is to arise
" upon her death intervenes between her
" estate for life and the inheritance. Agree-
" able with the case before mentioned in
" the Year Book, 1 Edw. 3. pl. 14, 15. which
" is tenant for life, remainder in fee, &c.:
" the tenant for life made a lease to him in
" remainder, for so many years as he (the
" remainder-man) should live; then tenant
" for life died, and so did the remainder-
" man: it was adjudged, that his wife
" should not be tenant by the curtesy,(a) be-
" cause the possibility which the tenant for
" life had that the estate might revert to
" him had barred her of all right of dower."

(a) Read *in Dower.*

But when an estate in joint-tenancy, or contingent interest, is created by one deed or instrument, or takes place at one time, and the different estates of the person who has two several estates inviting the application of merger take place at a different time, the doctrine of merger will under these circumstances operate in one case in alteration of the quality of the estate held in joint-tenancy; and in the other case in destruction of the contingent remainder.(*a*)

First, as to the alteration of the quality of the estate held in joint-tenancy. The propositions of Lord Coke in his Commentary, as stated in the most distinct terms, justify this conclusion: he says,(*b*)

"If a man make a lease for life, and after "granteth the reversion to the tenant for life, "*and a stranger*, and to their heirs, they are "not joint-tenants of the reversion, but the "reversion *is by act of law*, executed for the "one moiety in the tenant for life, and for the "other moiety he holdeth it still for life; the "reversion of that moiety to the grantee.

"And so it is if a man maketh a lease to "two for their lives, and after granteth the "reversion to one of them in fee; the join-"ture is severed, and the reversion is exe-

(*a*) Vin. Merger 366. pl. 13, 14. Ib. 368. pl. 14.
(*b*) Co. Litt. 182.

"cuted for the one moiety, and for the
"other moiety there is tenant for life rever-
"sion to grantee.

"If lessee for life granteth his estate to
"him in the reversion, and to a stranger, the
"jointure is severed, and the reversion exe-
"cuted for the one moiety by *the act of law*.

"If a man maketh a lease for life, and
"granteth the reversion to two in fee, and
"the lessee granteth his estate to one of
"them, they are not joint-tenants of the re-
"version; for there is an execution of the
"estate for the one moiety, and an estate for
"life, the reversion to the other, of the other
"moiety; and yet let it be remembered, that
"an express and formal surrender to one of
"them would have expressly operated for the
"benefit of both joint-tenants."

And in *Wiscot's* case, these diversities were insisted on, and the court adapted them, in deciding that case. The case was tried on an action of ejectment, and involved these circumstances.

"In an ejectment between *Giles and Wis-*
"*cot*,(a) *Giles* the plaintiff declared on a de-
"mise made to him by the husband and
"wife and *Wiscot* the defendant. On the
"general issue a special verdict was found,
"and that verdict stated that A. was tenant

(a) Wiscot's case, 2 Rep. 60.

" for life, the remainder to B. and three
" others for life, the reversion to C. and
" his heirs; C. levied a fine *sur conuzance*
" *de droit come ceo, &c.* to A. and B. to the
" use of A. for life, and after his death, to
" the use of B. in fee. A. died, and after-
" wards B. died, and the question was,
" whether the jointure was severed or not;
" so that after the death of A., B. was tenant
" in common. And it was resolved, that
" the jointure was severed; and this dif-
" ference was taken, when the fee is limited
by one and the same conveyance, there the
" one may have the fee-simple, and the
" other an estate for life jointly; but when
" they are first tenants for life, and after-
" wards one of them doth get the fee-sim-
" ple, or the fee-simple doth *descend* to
" one, there the jointure is severed; as if a
" man maketh an estate to three and to
" the heirs of one of them, there one of them
" hath the fee-simple; and yet the jointure
" doth continue, *for all is but one entire*
" *estate created at the same time*, and there-
" fore the fee-simple cannot drown the
" jointure which took effect with the crea-
" tion of the remainder in fee. But when
" three are joint-tenants for life, and one
" *purchaseth* the fee, or the fee *descendeth* to
" him; there the fee-simple drowneth the
" estate for life, for the estate for life was
" *in esse* before, and might be drowned or

" *surrendered*, and so cannot the estate
" for life in the first case. But in the same
" case, that is to say, when an estate is
" made to three, and to the heirs of one of
" them, and he who hath the fee dieth, and
" one of the survivors *purchaseth* the re-
" mainder, the jointure is severed *causa qua*
" *supra;* and when one tenant for life *pur-*
" *chaseth* the reversion in fee, if the join-
" ture should remain, he should have a re-
" version in fee, and an estate for life also
" in part, which reversion in fee he may
" grant over, and his estate for life should
" remain in part, which should be absurd
" and against reason; for in the first case,
" when an estate is made to *three and to the*
" *heirs of one*, he who hath the fee cannot
" grant over his remainder and continue in
" himself an estate for life, as it is holden in
" 12 E. 4. 2. b. But if there be tenant
" intail, the remainder to his right heirs, he
" may grant his remainder over, or devise
" it, as it is holden in 27 Ass. 60. for an
" estate-tail *cannot drown, nor be surren-*
" *dered, nor be extinct by accession of a*
" *greater estate.* 42 E. 3. 9. b. 29 H. 8.
" *Mortdauncester* 59 H. 4. 55. and 31 E. 3.
" *scire facias* 19. By the better opinion of
" all the books, he who hath the fee dying,
" and afterwards tenant for life dying, it is
" in the election of the heirs to have a *mort-*

" *dauncester*, (which proveth that his ances-
" tor died seised in fee) or a *scire facias*,
" or a *formedon* in remainder *at his pleasure*.
" It is agreed 39 H. 6. 2. b. if the reversion
" be granted to tenant for life and another
" in fee, the reversion *is extinct* for a moiety:
" for tenant for life cannot purchase or get
" the reversion or remainder of the same land,
" but the estate for life shall be drowned,
" having regard unto the estate which he
" hath gotten in reversion."

" Note, reader, it seemeth by the resolu-
" tion in this case, that if tenant for life grant-
" eth his estate to him in the reversion and
" a stranger, that *the same is a surrender* for
" one moiety; for it appeareth here, that
" by getting of the reversion and the par-
" ticular estate *at several times*, the rever-
" sion expectant on his particular estate for
" life cannot remain distinct in him, and
" grantable over, but the one shall drown
" the other, and benefit of survivorship,
" not regarded as it appeareth in the case
" at bar; and so the doubt in 7 H. 6. well
" resolved, I think."

And the joint-tenancy will also be destroyed, even when there is a *descent* at a period different from that in which the joint-tenancy is created.(*a*)

(*a*) 2 Rep. 60.

Let it be remembered in this place that by a confirmation, the estate of one of two joint-tenants may be enlarged, without enlarging the estate of the other, and this confirmation may be the cause of merging the particular estate, and severing the joint-tenancy. So the land may be confirmed, by way of enlargement, to one of several joint-tenants, in exclusion of his companions. But when the estate of one of two joint-tenants is confirmed in point of title, and not enlarged, the confirmation will give stability to the title of all the joint-tenants, (*a*) though they be disseisors ;(*b*) and yet a *release* to one of several disseisors would give to the releasee exclusively the right, if made by the disseisee. (*c*)

This is on the same ground of law which distinguishes between a grant by a tenant for life to one of several joint-tenants for life, and a surrender; and between a surrender on the one hand, and on the other hand a grant to husband and wife seised in right of the wife.

The case in *Plowden*, in which the term of the wife was protected from merger, owes its decision not only to the ground that the wife and another were joint-tenants, but the further ground, that the law protected the interest of the wife as held *alieno jure*.

(*a*) 1 Inst. 297. b.

(*b*) Litt. § 522. 1 Inst. 298. a.

(*c*) Ibid.

In that case (*a*) the husband had the fee, and made a lease, and the lease was assigned to his wife and another person, and the wife died, and it was decided, that the surviving assignee of the term should have the intirety of the land for the term; consequently, there was not any merger of the term for the moiety of the wife. While if the wife and another had been joint-tenants of the term, and they being so joint-tenants, the husband had purchased the reversion, there would have been a merger of the moiety of the wife, and a severance of the joint-tenancy.

This is sufficiently evident on principle. The point was contemplated in *Bracebridge v. Cook*, and influenced the decision. For it was said, (*b*) the case was no other than this, viz. if the lessor, who has the fee-simple, marries with a woman, his lessee for years, or if the husband makes a lease for years, and the lessee grants his estate to the wife of the lessor, whether this shall extinguish the lease for years, or not, for if it shall, the moiety of the lease in our case, is extinguished and merged by the immediate inheritance, which the husband had in the land. And the court held the law to be, that the immediate estate of inheritance, which the husband here had shall not merge

(*a*) Bracebridge v. Cook, Plow. 418.
(*b*) Plow. 418.

or extinguish the moiety of the term which the wife had, any more than in the other cases above said, because he had the inheritance in his own right, and the term in right of his wife, in which case the freehold and inheritance of the husband, wherein the wife has nothing, shall not merge the term of the wife. For the law, which carries in itself reason and equity, will not do prejudice to another, and here the wife is other than the person, who has the inheritance, and the marriage of husband and wife is a laudable thing, for which reason the law will not prejudice the wife in her chattels real, which are things of continuance, and of more value and worth than things personal. Nevertheless, the husband himself might have given away the wife's term by an express act, as if he had made a feoffment of the land, or a new lease, or the like; but forasmuch as he has not done this nor any thing else with the land, and has made no disposition at all of it, but has left it, to the judgment of the law, the law will preserve the estate of the wife, which estate, as to her, is disjoined *from the freehold* and the fee-simple.

So that the decision turned on the ground of protection to the interest of the wife, and not of the preservation of the joint-tenancy.

The reasoning in the subsequent part of the case is to be read as subject to this qualification!!

2d, *As to the Destruction of contingent Remainders.*

Notwithstanding an intervening contingent remainder, it seems to be an established position that the particular estate will merge in the next vested estate in reversion or remainder, whether the reversion or remainder accede to the particular estate, or the particular estate be an accession to the estate in reversion or remainder; and as well when this accession is *by the act of* the parties, as by express limitation; or by operation of law, as by descent; so as this act of the parties, or this operation of the law,(*a*) do not take place in *the same instant* of time, in which the particular estate is limited.

But as to this point, it seems, (*b*) the doctrine of merger does not extend to copyholds, so as to exclude and destroy a contingent remainder by the accession of one vested estate to another.

In *Mildmay v. Hungerford* (*c*) a copyhold at *Newington*, was devised to the plaintiff for life, remainder to his first and other sons in tail, remainder to the defendant, Sir *Giles*

(*a*) Kent v. Harpool, T. Jones, 76. Vent. 306. Hooker v. Hooker, Rep. T. Hardwicke, 13.

(*b*) See Fearne's Rem. 3d Edit. page 261.

(*c*) 2 Vern. 243.

Hungerford in fee. And the plaintiff being minded to make himself absolute owner of the estate, his wife being then *privement ensient* of a son, was advised that if he bought in the reversion in fee from Sir *Giles Hungerford*, and took a surrender thereof, to his own use, that would merge his estate for life, and consequently destroy the contingent remainder to his son, there being then no issue born; and this suit was commenced to have a security cancelled, which the plaintiff had given to the defendant for the purchase of the reversion in fee; and the ground of equity which the plaintiff alledged was, that he was deceived, in regard that at the time of filing his bill he understood, such surrender of the reversion would not bar the son then born, because the freehold and inheritance was in the lord, so not the like inconvenience as of freehold estates, at common law, in respect of contingent remainders, where there is none against whom to bring the præcipe. But on the point of merger, or no merger, the court gave no opinion.

But in the case of *Pawsey v. Lowdall,* (*a*) B. tenant for life of a copyhold, with a limitation to the heirs of his body begotten, surrendered to the lord of the manor, to

(*a*) 2 Rol. Abr. 749.

the use of the lord to do his will with it. B. died. The question was whether, admitting the limitation to the heirs, to operate as a remainder to them, (by purchase) the contrary of which was afterwards determined, such remainder was destroyed by the surrender of B.; and it was adjudged that the remainder was not destroyed, because the legal freehold was in the lord during the life of B. so that even a vested remainder-man could not have entered during the life of B.

And in *Lane and Pannel* (*a*) a feme covert and a stranger were joint-tenants for life of copyhold lands, with remainder to the heirs of the body of the baron and feme. The stranger surrendered his moiety to the husband and wife, and afterwards the husband surrendered the whole to B. in fee. The feme died leaving issue, afterwards the husband died. The question was, whether the remainder to the heirs of the husband and wife, vested in the issue. It was adjudged that when the stranger conveyed his moiety to the baron, the joint-tenancy between the stranger and feme covert was severed, and when the baron afterwards conveyed the whole to B., B. took an estate in one moiety for the life of the wife, defeasible by her on the death of her husband, and in the other moiety

(*a*) 1 Roll. Rep. 238.

for the life of the stranger; (*a*) and it seems that the surrender by the husband to B. in fee, did not destroy the contingent remainder. Mr. *Fearne* has concluded that the legal estate, being in the lord, the surrender of the husband passed no more than he legally might pass. But this conclusion, though correct, is not of much weight when applied to the doctrine of merger, since all the cases in which merger has taken place, are cases in which the particular tenant has not conveyed more than he might lawfully convey.

On the destruction of contingent remainders in copyholds, the learned *Gilbert* (*b*) has taken this distinction: if an estate be given to a copyholder for life, remainder to the right heirs of I. S. if the tenant for life die leaving I. S. there it seems clear that *the remainder is destroyed;* for, he observes, it cannot take effect as by the limitation it ought. But if tenant for life in that case had committed a forfeiture, or made a surrender, and afterwards had died in I. S.'s life-time, it seemed to be very clear that his right heirs might take; for his remainder was not to take effect after the determination of the interest of tenant for life, *but after his death,* and when that happened he was able

(*a*) Fearne 407. but see the case.
(*b*) Gilb. Ten. 249.

to take: and from the MS. opinions given by several gentlemen of the most distinguished eminence, it appears that they all agreed in opinion that a contingent remainder of a copyhold would be supported by the legal estate in the lord, notwithstanding any act which could be done by those who were the owners of the vested estates.

Titles frequently depend on the question whether a contingent remainder has been effectually destroyed by a merger of the particular estate, by which the contingent estate was supported. These titles are in general to be accepted with great caution, and are not strictly marketable. The destruction of the contingent remainder, depends on the fact, that the contingent remainder was of the legal ownership, for an estate in the equitable ownership does not admit of destruction. In investigating the title, therefore, when it depends on the circumstance of a contingent remainder being effectually barred, the title must be investigated very narrowly, to see that it is clear that the ownership was legal, and that the legal estate was not *in a mortgagee or trustee* so as to make the interest equitable.

That the doctrine does not apply to an estate for several lives arising under the same limitation as giving *one undivided* and *entire time of continuance*, has already been urged.

On this point, a few observations will be proper in this place.

At one time it was contended that an estate for several lives could not exist, because the time of one life must merge in the time of the other, and so in rotation. The argument either proceeded on the supposition that these limitations gave *several and distinct estates;* or it was advanced without sufficient attention to the circumstances under which the doctrine of merger is applicable. After several discussions on the subject in the reign of queen *Elizabeth* this point was settled. It was agreed that a *limitation for several lives*, gives *one entire* and undivided estate, and in consequence the courts determined, that there could not be any merger, since there were not two estates, so that one might merge in another. The cases of *Ross* and *Utty Dale*, already cited, are the authorities relevant to this point.

From these cases it is evident that the ground of the determination, was that the limitation for the several lives gave *only one entire and undivided estate*, and not *several and distinct estates.* The conclusion which was drawn, and the determination which was made, that there could be no merger, were consequences necessarily flowing from that determination. But it must be remembered that the sole ground of the determination in *Ross's* case was, that the lease for three lives gave one entire estate, and not several and distinct estates; it did not turn merely on the circumstance that

the same person was under the same deed to have the right of enjoyment for several lives. The right of enjoyment for several lives, may be limited to the same person, by the same deed, and yet a merger may take place. Thus, as has frequently been observed, a lease to A. for the life of B. remainder to himself for his own life, gives several and distinct estates, and therefore, and because the estate in remainder, which is for his own life, is larger than the estate for the life of B., the estate for the life of B. will merge in the estate of A. for his own life. So if in *Ross's* case, the lease had been for the *several lives*, by way of distinct and successive estates, one of those estates might have merged in the other, as is evident from the doctrine deducible from *Lewis Bowles's* case; that, if A. by several limitations, even in the same deed or in distinct deeds, hath an estate for the life of another person, with an immediate remainder for his own life, the first estate will merge.

The distinction then upon the cases of this class is, that when a lease is made for several lives, as one undivided and entire point of time, the time of one life cannot merge in the time for another life, because there is one estate only, and not several and distinct estates: and that when a lease is made for several lives, as distinct periods of time, giving one estate in possession, and others in remainder, then *cæteris paribus*

there is scope for the doctrine of merger; because there are several estates; but it must be remembered that that doctrine cannot operate, unless the estate in remainder is larger than, or as large as, the estate in possession. And therefore when A. is lessee for his own life, with a remainder to him for the life of B. this doctrine cannot affect either of the estates, since the estate in possession, which is for his own life, is larger than the estate for the life of B. which is for another life.

From the authorities adduced in the next division, it would seem that a conveyance by A. and B. being successive tenants for their lives, would give one united estate, to continue for the several lives; being an example of union and consolidation without merger.

Before this section, or head of division, shall be closed, it will be proper to observe, that the time of an estate for lives, may be divided into several estates; and when so divided may merge: as if A. tenant for three lives, grant or convey the land by way of particular estate and remainder, or by way of use to different persons, for their respective lives. Under this arrangement the estate is divided into three estates, and there may be a merger in like manner as if they had been originally three successive estates.

In this instance, indeed, the prior estates

are more clearly liable to merge in the ultimate estate; especially when that estate is a reversion; since they are either actually or in effect, derived out of that estate, for the ultimate taker will have a reversion consisting of that estate which was for three lives, subject only to the prior particular estates.

Eustace's case (*a*) is also relevant to the learning of estates for life. Though two persons being *joint-tenants* for life, have an estate which by its constitution, will continue for their joint lives, and the life of the survivor of them; yet on a severance of the joint-tenancy, the moiety of each will be held for his life only.

These distinctions occur:

1. If both join in a grant, the estate will continue for their several lives.

2. If one makes a lease for years, the lease may, unless the joint-tenancy be severed, continue until the death of the survivor.

3. One may release to the other The quantity of the estate of the releasee is not easily ascertained. It should seem to be only for his own life.

4. And on a grant by either or by each separately to a stranger, the stranger will be tenant of each moiety only for the life of the grantor.

(*a*) Jones, 55. 3 Salk. 204. Essay on Estates, chap. Life.

CHAP. XIII.

That the Union of two Estates in the same Person by means of the joint Act of the respective Owners of these Estates, with an Intention that the Estate of their Assignee should continue for the collective Time of their several Estates, will not be any Cause of Merger.

THIS point may be collected from different passages of books of authority. These passages warrant the conclusion in all the extent in which it is advanced. That the prior estate should, under these circumstances, be exempt from the influence of merger, is consistent with the grounds and principles on which this act of law is allowed to take place. All the cases in which the doctrine of merger has prevailed, are authorities only that one estate will be annihilated, when there are two distinct estates, and the time of one becomes, either

in point of fact, or in intendment of law, inconsistent with the other; or there is an evident intention to change the tenancy under one estate, to a tenancy under another estate. For when one person accepts a conveyance from two persons who have distinct estates; becoming the purchaser of the estate of each of them; and their estates give particular interests only, and not the complete ownership and absolute dominion over the property, either generally or subject to certain particular estates; it is a natural and reasonable inference that he intended to have the right of enjoyment for the several periods of time comprised in these estates. To many purposes there is an union and consolidation of the two estates. They become one entire interest, so as to perfect a right of dower, tenancy by curtesy, &c. and give the remedies proper to the estate considered as an estate of inheritance, in possession: still, however, there is not any merger. To merger it is essential that the time of one estate should in point of title, be absorbed and lost in the time of the other estate; while in the case under consideration, the right of enjoyment will continue for *the several times* of the several estates. Another circumstance peculiar to these cases, and distinguishing them from those to which the doctrine of merger is applicable, is, that the right of enjoyment

continues under each estate for the time of that estate; so that under these circumstances the charges on the *reversionary or more remote* estate, which were created by the former owner of that estate, will not be accelerated by the union and consolidation of the two estates.

In *Bredon's* case(a) it seems to have been agreed that if a tenant for life and the owner of the first remainder in tail, make a feoffment *by deed,* this is not a discontinuance, for each giveth that which he may lawfully give; and although the owner of the first remainder should die without issue, *the feoffee shall enjoy the land during the life of the tenant for life.* This opinion proves that under a conveyance by the owner of two estates, there is not any merger, when they join in conveying these estates. The case of *Bredon* itself, from which this opinion is extracted, is an authority for the same conclusion. In that case tenant for life with a remainder over in tail, joined with the first tenant in tail in a fine *sur conuzance de droit come ceo, &c.* to a stranger in fee, who rendered a rent-charge of forty pounds a year to the tenant for life. The first tenant in tail died without issue, and the second tenant in tail entered, and on a distress

(a) 1 Rep. 77.

by the tenant for life for his rent, and on a replevin and avowry, a question arose on the right of the tenant for life to distrain. That question, of consequence, involved another question whether the estate for life was a *continuing* interest as against the second tenant in tail; for the owner of that estate resisted the demand of the rent, on the ground that the estate for life was annihilated, by its union with the next estate of inheritance. This, it must be observed, was the only possible ground on which the second tenant in tail could claim the right of possession, or deny the validity and continuance of the rent, tendered to the tenant for life, by the fine, in which he concurred with the first tenant in tail; but it is evident the court of Common Pleas, in which this case was depending, admitted that the time of the estae for life was a continuing estate, and that the tenant for life was intitled to distrain for the rent; for judgment was given that the avowant should have return of the cattle; and it was held that the rent did remain after the death of the first tenant in tail without issue; consequently they determined that the estate for life *was not merged* by its union with the next estate of inheritance. In delivering the opinion on this case, the court observed, " that the said fine levied " by tenant for life, and him in remainder, " was no discontinuance, either of the first

"remainder in tail, or of the second, be-
"cause each of them gave only but that
"which he might lawfully give, viz. the
"tenant for life gave his estate, and he in
"the remainder a fee-simple, determinable
"upon his estate-tail, and the second re-
"mainder is not discontinued or devested
"thereby. And that it shall be the grant
"of both, *of their several estates;* and from
"thence it followed that it was not any
"forfeiture of the estate of the tenant for
"life; forasmuch as each gave that which
"he might lawfully give. And it was said,
"that it cannot be a forfeiture, for the law
"(which abhorreth wrong) shall construe
"it, first, to be the grant of him in remain-
"der in tail, and afterwards the grant of
"the tenant for life: as in many cases, *ut*
"*res magis valeat, quam pereat*, the law
"shall make construction; and therefore in
"the case of a fine, if tenant in tail and one
"A. levy a fine to a stranger, who grant-
"eth and rendereth to A. for years, render-
"ing rent, and by the same fine, grant the
"reversion to tenant in tail and his heirs,
"this is good; and although that all be
"by one fine, at one instant, yet in the
"judgment of law, the lease doth precede
"the grant of the reversion, as it is holden
"in 26 Hen. 8. Br. Fines 118. and so was
"it adjudged upon demurrer between *White*
"*and White*, M. 41 and 42 Eliz. in the

" Common Pleas, Rot. 366. So in the
" case at the bar, the grant of the tenant
" in tail, shall precede, in the judgment of
" the law, the grant of the tenant for life,
" although that all be by one fine. And
" note the difference between this case and
" the case in 41 E. 3. 21. a. and 41 Ass. 2.
" for there, inasmuch as the wife survived,
" it is upon the matter a feoffment made
" by her, for she is in by her feoffer; and
" the second remainder in tail was devest-
" ed thereby; and that he in the first re-
" mainder, with his wife (betwixt whom
" are no moieties) accepted a feoffment of
" the tenant for life; but here in the case at
" the bar, he in the first remainder doth
" join with the tenant for life, in making
" of an estate; and this joining doth alter
" the nature of the act; for by this joining
" the estate given passeth from both; so
" that each giveth his estate; but in the
" case in 41 E. 3. 21. all the estate did
" pass from the tenant for life, and that
" was fee-simple, which of necessity ought
" to be a forfeiture of all the remainders,
" for it cannot be a forfeiture, but ought
" to give cause of entry to each in re-
" mainder, for his time. But the case in
" Mich. 16 and 17 Eliz. Dyer 339. a. was
" agreed for good law; for there both the
" feoffors had but estate for life; and
" therefore their feoffment did divest the
" remainder in tail, and so a forfeiture;

" but here a tenant for life and he in the re-
" mainder in tail join in the fine, &c. And
" it was said, it was adjudged in the King's
" Bench in the case of one *English*, that if
" there be tenant for life, the remainder in
" fee to an infant, and they both levy a
" fine, and afterwards the fine is reversed as
" to the infant, yet the conusee shall have
" the land for the life of the tenant for life,
" for each gave that which he might law-
" fully give. But it was said, if tenant for
" life be, the remainder unto the queen for
" life, the remainder to another in fee, if
" the first tenant for life maketh a feoff-
" ment, the same is a forfeiture, and yet
" nothing passeth but his own estate, (*a*)
" but inasmuch as he hath made a livey in
" fee, it is a forfeiture; although that none
" of the remainders are vested. See 30
" Ass. 47. If tenant for life enfeoffeth him in
" the remainder for life, with warranty,
" the same shall enure by way of surren-
" der, and is no forfeiture, *Quod nota*. And
" it seemeth by them, if tenant for life,
" and he in the first remainder in tail make
" a feoffment by *deed*, that it is not a discon-
" tinuance, nor a devesting of the second
" remainder, for each giveth that which
" he may lawfully give; and although he

(*a*) Because her prerogative preserved her seisin, and consequently the seisin of the remainder-man.

"in the first remainder dieth without issue, "the feoffee shall enjoy the land during "the life of the tenant for life; and no for- "feiture in the case, for the causes before "said: but if a feoffment be made by *word*, "then it is a *surrender* of the tenant for "life, and the feoffment of him in the re- "mainder, *ut res magis valeat quam pereat.* "See 27 Ass. 46. Plow. Commentaries 541. "a. 14 H. 7. 4. a."

And in *Treport's* case (*a*) it was said by *Popham* C. Just. "if tenant for life and he "in the reversion make a gift in tail, ren- "dering rent, the lessee(*b*) *shall have the rent* "*during his life.*" This of course was an admission that the estate of the tenant for life *was a continuing ownership;* for unless that estate existed in point of law, distinct from the inheritance, and not confounded in the same, the rent could not have belonged to the tenant for life; and *Popham*, in terms still more express, declared it to be his opinion that if tenant for life and he in the reversion had made a feoffment *by deed* at the common law, the feoffee should hold of the *lessee*, during his life, which proves, in a manner the most incontrovertible, that the estate for life was not destroyed; for supposing it to have been destroyed, the tenure must have been of the

(*a*) 6 Rep.

(*b*) Read tenant for life.

reversioner, and not of the *tenant for life.* From this opinion it must be collected that if the estate-tail had determined in the life-time of the tenant for life, the right of possession would have been in the alienee under the estate for life, and not in the reversioner, till the estate formerly of the tenant for life, was determined by his death, or by some other means. These observations shew the foundation of the judgment in *Treport's* case; and that judgment fully proves, that notwithstanding the tenant for life joins with the remainder-man, in any assurance proper to the tenant for life and the remainder-man, the estate is considered during the time of the estate of the tenant for life, as held under him, and not under the tenant of the more remote estate, with whom he joins in that conveyance, and to whom he might have surrendered; and it was expressly held in this case that if lessee for life, and he in the remainder or reversion in fee, make a feoffment *by deed*, each giveth his estate, viz. lessee for life, his estate by livery, and the fee doth pass from him, in the remainder or reversion.

The case of *Bredon*(a) was noticed by Lord C. Just. *Holt* in the case of *Symonds v. Cudmore.* According to the report of *Salk.* the chief justice advanced a position which militates

(a) 1 Salk. 338.

against the principle established by the determination in *Bredon's* case, he is stated to have said that if there be tenant for life, reversion to A. in fee, and A. make a lease for years, and then tenant for life and he in reversion join in a fine, the lease shall take effect presently. At the same time he qualified his opinion, and admitted the general principle which governed the determination in *Bredon's* case, by observing that the estates passed severally according to *Bredon's* case; but he added they are now *consolidated*, or if the lessee should die during the life of the lessor, tenant for life, there would be an occupant. But with deference to the opinion of so great and respectable a lawyer, this is a *non sequitur*. For though the estate for life may have continued for the benefit of the lessee, yet no objection exists against its forming part of the estate of inheritance, so as to give a right of succession to the heirs, *as heirs;* or exists against its being blended in the reversion or remainder in fee, for all the purposes of tenure and ownership.

It is impossible that this opinion can be supported without denying the principle upon which *Bredon's* case was determined; or that the opinion can be maintained consistently with the opinion *Popham* delivered in *Treport's* case. It is even doubtful whether the opinion ascribed to Lord *Holt* was

delivered by him in these terms: It is remarkable that no notice is taken of this opinion in the 4 vol. of Modern, in which there is a fuller, and more detailed report of the judgment than that which is given by *Salkeld.* But certain it is that, notwithstanding the silence of the Modern Rep. on the subject of this opinion, notice was taken of the point by the chief justice; for it appears by *Carthew* that his lordship did advert to that point, and delivered an opinion on the same; and that opinion, properly understood, was formed on grounds exactly the same as those which governed the determination in *Bredon's* case. The report is in these words, and *Holt*, chief justice, put these cases. If tenant for life *and he in reversion in fee*, join in a fine or feoffment to a stranger, the estate for life is merged; so likewise where he in remainder in tail joins with the tenant for life *ut supra.* And yet in the last case the feoffee or conusee shall hold during *the life of the tenant for life, though the tenant in tail die without issue.* A very small portion of attention to the language of these reporters will enable the reader to collect that neither of them has given a fair and accurate account of that opinion, which in all probability was delivered by the chief justice. It is evident his lordship did not deny the authority of *Bredon's* case; on the contrary, it may be collected that he recog-

nized that determination, and admitted its force, and application. It is equally clear from *Carthew*, that the cases to which the chief justice referred, were contrasted; and from a comparison of the several reports of his opinion, it may be inferred, that he distinguished between a conveyance by a tenant for life, under different circumstances, delivering it as his opinion that there was a merger of the estate for life under some circumstances, and a continuance of the estate for life, under other circumstances.

By referring to *Treport's* case, and *Bredon's* case, already cited, it will be found that a distinction had been taken, and a difference made between the different circumstances, under which a tenant for life joined with the reversioner or remainder-man, in conveying or giving up his estate for life. Thus in *Treport's* case; which was the first in point of time, though it was held that when lessee for life and he in remainder or reversion in fee, make a feoffment *by deed*, each giveth his estate, viz. lessee for life his estate by livery, and the fee-simple doth pass from him in remainder or reversion, yet it was agreed that if the feoffment were by word, that is without deed, then it should be the feoffment of him in reversion or remainder, *and the surrender of lessee* for life; for this plain and sensible reason, that the

remainder or reversion, as such, could not pass without deed. The same distinction was taken in *Bredon's* case, and in that case it is said, it seemeth that if tenant for life, and he in the first remainder in tail make a feoffment by deed, this is not a discontinuance nor a devesting of the second remainder, for each giveth that he may lawfully give; and although he in the first remainder die without issue, the feoffee shall enjoy the land during the life of the tenant for life: then follows the contrast; but if a feoffment be made by word, then it is a surrender of the tenant for life, and the feoffment of him in remainder, *ut res magis valeat quam pereat.* The grounds and reason of this difference, with many other apposite cases illustrating the learning on this subject, are stated by *Bacon* in his Abridgment; and when the estate for life is, even by construction, surrendered, it does not require any argument to shew that the possession is no longer held by the surrenderee under the title of the tenant for life.

Since these distinctions had been so clearly established and so fully settled, by a series of determinations, it is more than probable, that the opinion expressed by Lord Chief Justice *Holt*, was founded on the distinction afforded by these cases, without any intention to convey an idea, corresponding either in words or in sense with

the language of *Salkeld's* report, or exactly agreeable to the distinction to be collected from the terms in which *Carthew* has reported the same opinion. The allowance to be made for the difficulty of taking an accurate account of every word which escapes from a fluent and ready speaker, will satisfy the mind that there has been some omission in giving full force to all that was said by his lordship. And when it is considered that the opinion delivered by his lordship, was not immediately relevant to the case then before the court, there is additional reason for supposing that there was less attention paid by the reporters to the observations which are the subject of these remarks.

The Earl of *Clanrickard's* case affords an illustration of this doctrine, (*a*) and will introduce the sentiments of that eminent lawyer, Sir *Henry Hobart*, on this subject.

In that case a lady was tenant in tail with reversion to her husband for life, and they joined in a fine; and it was contended that this fine was a discontinuance by the tenant in tail, and so the estate for life did drown and extinguish itself in the fee-simple, granted to the conusee.

The argument on the behalf of the demandant was, that when the estate-tail de-

(*a*) Hob. 273.

termined, the demandant's reversion was to come into possession, as the estate for life was extinct, in the estate given by the fine; and that the fine should not, as to the estate for life, operate to the benefit of the conusees, but of the old remainder or reversion.

The report of Sir *Henry Hobart's* judgment, by way of answer to this argument, is in these terms:

"First, That the estate for life, is not by that fine, 7 Jac. drowned and extinct; but that the estate in tail, and for life, are both conveyed lawfully, as estates in being to these conusees: so, First—the estate for life is not forfeited by this fine. Secondly, it is not involved in the estate given by the tenant in tail; but it is given distinctly, as an estate by itself in judgment and by the force of law. If the estate for life were extinct or invalid in the estate given by the fine, 7 Jac. it must be either by surrender, forfeiture or confirmation. By surrender it cannot work. Note, that this could not work by way of surrender, as in *Bredon's* case it might, because it is a remainder following, and yet it was not taken as a surrender, for then it had been against the judgment."

"And here first I do exceedingly commend the judges that are curious and almost subtil, *astuti* (which is the word used in the

Proverbs of *Solomon* in a good sense, when it is to a good end) to invent reasons and means to make acts, according to the just intent of the parties, and to avoid wrong and injury which by rigid rules might be wrought out of the act. And that is well performed in *Bredon's* case, Co. lib. 1. fol. 76. Where a tenant for life and he in remainder in tail join in a fine (*come ceo*;) the tenant in tail dies without issue, the conusee shall hold the land, during the life of the tenant for life. Note in *Bredon's* case a strange effect, for *the conusee that had a fee made of both estates, as soon as tenant in tail died without issue, had but an estate for life*; for there was no discontinuance nor change of the reversion, but a lawful giving of their estates and no more. So in *Englishe's* case there. There is no forfeiture in this case, because the tenant for life gives not the fee alone, but gives only so much of the fee as he hath, and joins with another in giving a fee that hath power to give a fee during his estate, without wrong to any, and therein differs from M. 16 and 17 Eliz. Dyer. 339. of tenant for life, remainder for life, joining in a feoffment in fee; and from 41 E. 3. 21. of tenant for life, making feoffment in fee to him in the remainder in tail and his wife. And if we need (as in *Bredon's* case) to avoid discontinuance, it was devised, that the remain-

der in tail should be taken to pass first; so here to avoid forfeiture, the remainder for life may be said to pass first."

"It is also no discontinuance, because either of them gives their estate lawfully, and there is no necessity to conceive a wrong to the reversion, since a fee may be determinable by operation of law, as in *Bredon's* case, though it should by the fine have been *a perfect fee*, if there had been such an one to give. And *Coke* in that case collects that by reason of that case if tenant for life, and he in remainder in tail, make a feoffment by deed, this shall be no discontinuance, nor shall divest the reversion or remainder depending; because it shall amount but to a grant of both their estates; and so it shall be a fee determinable upon both their estates, and no absolute fee from the one nor both, whatsoever the word imports, the one construction working by right, the other by wrong, which the law will not admit, if the other may by any means stand. So since these estates might have been several without forfeiture, the law shall marshal them, joining accordingly. So that this way, though the tenant in tail in possession, should make a discontinuance, and so work a wrong, yet the grant of tenant for life in remainder might be lawful. Note my opinion upon *Englishe's* case hereafter. These things

standing thus, it must follow, that the estate for life doth *not pass, drowned* in the tail, as giving place to it. But it is true, that both the estates that were in them several, did pass from *both as distinct authors of* the *new estate*, according to their measures. But now in the *conusee they are but one entire estate* made of two, and therefore remove the confusion, as chymists do, by extracting and segregating the simples of a compound: as suppose this conveyance were upon condition, the entry shall restore their estates as they were before: so in *Englishe's* case, (in *Bredon's* case) the conusee took two estates, and from two givers, tenant for life, and an infant in remainder by fine. The conusee now had *but one estate*, yet upon reversal of the fine, the law restoreth no more to the infant, but the remainder, because he gave no more, yet the estate for life was, as in this case, given, confounded in the fee, and no forfeiture made in *Englishe's* case. So in this case I hold it clear, that if an infant tenant in tail in possession, and he in remainder for life had joined in a fine, and the infant had reversed his fine, yet the remainder for life should have vested with the conusee. Then again, admit it should be taken as a discontinuance of the tenant in tail, and a confirmation, (which is the least) of the tenant for life in reversion,

who had that estate by the grant of the donee himself, what color is there then that the donor should recover the land, as long as that estate is out, that himself gave? No more than if the tenant in reversion had not joined, but kept his right, or released it to the discontinuee. And therefore put the case, that A. donee in tail remainder to B. for life, reversion to C. in fee, A. discontinue at the common law, this is a present wrong to the issue in tail, and to B. and C. but such as none can remedy, but in their several times: so that if the issue of A. sue not, B. cannot; if B. sue not, C. cannot by the same reason; if B. will release to the discontinuee, or confirm his estate, it is all one to C., for his estate or right is not thereby anticipated, for there was nothing taken from him but his reversion, which is all that he can require."

"But if in *Bredon's* case, the tenant for life had surrendered his estate to the tenant in tail, in the first remainder, who had levied the fine and died without issue, he in the second remainder might have presently had his formedon, though the tenant for life were alive; for the estate for life was so drowned, as there was no more but the estate in tail, with the other remainder following. So the difference is where the tenant for life in *Bredon's* case surrenders, or in the case releases to the tenant in tail

before the alienation, so that he hath all, and gives all, one giver, and one estate only. And where there is a joining in the conveyance, or a releasing or confirmation to his conusee, in which case it is clear, that he gave but his own single estate, and the other remains to be given by the proper owner."

"But that that troubles the judgment in this case, I suppose to be the book of 9 Hen. 7. 25. and the opinion Co. L. 6. 70. Sir *Moyle Finche's* case, That if donee in tail be disseised, and the donor disseise the disseisor, and make a feoffment over, and then the donee re-enter upon the feoffee, he shall have but his first estate-tail, and the reversion shall be turned to the first disseisor, and shall not remain with the feoffee of the donor; whereof the reason is, that where the stranger disseiseth the donee, he gained by wrong both the tail and the reversion, and then had in him one entire estate in fee: now when the donor disseiseth him, he gains the estate which the disseisor had, which was entire, and so his disseisin cannot divide the estate as they were; for his whole estate is by the wrong in the first disseisor, none having right of entry, but the donee; then when he makes his feoffment over, that gives *no estate, but that wrongful one*. But it *gives away his right also;* not by granting, but by drown-

ing and dying in the land. So then when the donee re-enters, he can have no more than his own, and must by his entry restore the reversion: the feoffee cannot hold the reversion, because the estate he had was no other than that was wrongfully gotten by the donor, from the first disseisor, and given to him; wherein there was, in effect, the tail of the donee, and the reversion of the disseisor: and now when the donee re-enters, he cannot restore the reversion to the feoffee, in respect of the right, because it is utterly annihilated by the feoffment, which cannot give, but doth distinguish (*a*) it.

"And now you must see no other right, but that which grows out of the disseisors, whereof the first is both the best in estate and right; and therefore if the first disseisor had entered upon the feoffee of the donor disseisor, and then the donee had entered upon him, no doubt the reversion had been left in the first disseisor, and then the feoffee had no way by his buried right, to recover now, or after the death of the donee without issue: so here difference appears, that in this case the first disseisor hath right to the whole estate, wherein the right is buried, and so redounds to his whole benefit: in the principal not so; for the Lady

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(*a*) Read *extinguish*.

Frances had right only to the reversion in fee, after both the estates ended, whereof the one helps the other.

" So note, that the right doth extinguish whether it be by feoffment, release, or confirmation, to the benefit of the estates then last in being, as of the first disseisor. Much more here of the discontinuee being now *in esse*, not to the benefit of the ancient right, for one right cannot extinguish another."

The excellence of his judgment, and the illustration it affords of the point now under discussion, and of the principles involving different learnings connected with merger, will supersede the necessity of an apology for the length at which this case is introduced.

In practice it frequently becomes necessary to consider the mode, in which a conveyance operates, when the same is made by a tenant for life, jointly with the tenant in-tail, who is the owner of the next immediate estate of inheritance, either with an express declaration of uses to the tenant for life, and to the tenant in-tail according to the extent of their former ownership; or with an intention not expressed, that the uses shall result to them agreeably to the estates conveyed by them respectively.

In *Beckwith's* case(*a*) it was resolved on

(*a*) 2 Rep. 56.

the broad ground of general principle, that every one may dispose and declare the use of the land according to the estate which he hath in the land; for the declaration and disposition of the use doth follow the ownership of the land as the shadow followeth the body. And now by the statute of 27 H. 8. the shadow or the accessary draweth to it the body, and the principal (that is to say,) the use draweth to it the estate of the land, and therefore in all reason the owner of the land ought to limit the use; for by it the estate of the land is transferred to the use: and it seems to be agreed that if there be two tenants, one for life, and the other in fee, and they levy a fine without declaration of any use, the use shall be to them of the same estate as they had before in the land. So if A. tenant for life, and B. in reversion, or remainder, levy a fine generally, the use shall be to A. for life, the reversion or remainder to B. in fee, *for each granteth that he may lawfully grant*, and each shall have the use which the law vesteth in him, according to the estate which they convey over.

And in the case of *Waker and Snowe* (a) one point on which the court agreed was, that if two persons, of whom one is tenant

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(a) Palm. 359.

for life, with a remainder to the other in tail, join in a feoffment to Sir I. S. and his heirs, who suffers a common recovery, in which the tenant in tail is vouched, this shall be intended to the former uses.

But they seem to have distinguished between the operation of a conveyance by the tenant for life and the tenant in tail jointly, and a surrender by the tenant for life to the tenant in tail; declaring that no use could be declared *to arise out of an estate which is surrendered*, and at the same time, admitting that when a surrender is made with the intention to enable the reversioner to do any particular act, as to suffer a common recovery, and for that purpose only, the courts will raise an use out of the estates taken by the recovery. These opinions were expressed in two resolutions of the court.

The third resolution was, that although *Edward Egerton* surrendered his estate for life to Sir *John Egerton*, by which this estate for life was extinguished, yet if the intent of the surrender was only to enable Sir *John Egerton* to suffer a recovery, to bar the remainder dependant upon the estate for life and the estate-tail, the new recovery shall be to the use of the tenant for life, if no other uses can be shewn.

The fourth resolution was, although *Edward Egerton* and Sir *John Egerton* joined

in a feoffment to the use of J. S. and his heirs, and J. S. suffered a common recovery, in which *Edward Egerton* is vouched, this shall be intended to the former uses.

There was an additional reason, (and it was urged,) the recovery was suffered in pursuance of a covenant for *further assurance.*

In the case of an actual surrender, the estate is clearly extinguished, and cannot be revived, unless a condition be annexed to the surrender. Therefore it is apprehended the use to the tenant for life must arise out of the estate of the reversioner, and consequently the estate arising from this use will be affected by all the incumbrances attaching on the reversion.

And a surrender in fact, has universally the effect of putting an end to the right of enjoyment under the estate which is surrendered, as far as the surrender is valid. Hence the objection of Lord *Hale*(a) that the reason given in *Bredon's* case made against the resolution. But it is evident that his lordship did not carry in his recollection the distinction taken in *Bredon's* case: he took notice that it is said the remainder in-tail passed first, and observed that if it did, the freehold must go by surrender, and so

(a) 1 Ventr. 100.

drown; while *Bredon's* case is an authority only for the point, that the estate for life has continuance in those cases in which the remainder may pass as a remainder, and the estate for life passes as a continuing estate; and hence the difference between a feoffment from them *by* deed, and a feoffment *without* deed.

It may be objected that these cases are inapplicable to the learning of merger, and prove nothing material to that learning; that the modification of the use, in its distribution between the several owners of the ancient estates, is the consequence of the equitable jurisdiction by which uses were regulated in their fiduciary state; and that the same rules now prevail in the courts of law under the express directions of the statute by which uses are transferred into possession. In these objections, whenever they are insisted on, there will be considerable weight. But it must be called to mind, that the doctrine of merger may be relevant to cases even of this description. When the tenant for life and tenant in tail join in a recovery, it is then true that the estate of the recoveror is sufficiently extensive to support the different rights of the parties to the conveyance, and to supply an ownership, which will serve the uses resulting to them, or declared in their favor; but then this question arises, does that ownership

arise *solely under the estate-tail*, as enlarged into a fee-simple, by having merged the estate for life; or does it arise partly under the estate for life and partly under the estate-tail as enlarged into a fee-simple? A necessary consequence of admitting the estate for life to be merged, will be, that the use arising or limited to the tenant for life, will be affected with the charges and incumbrances of the tenant in tail, while a contrary doctrine will support the right of the tenant for life, to the extent and according to the manner and degree of the former ownership. That the time of the estate for life is a continuing interest or not, is a question of law; and cannot, as against creditors, &c. be affected by the practice or the rules of courts of equity, since if in the hands of I. S. the reversion or remainder was come into possession, then the uses arising on the estate in him, must be commensurate to that estate, partake of its nature, and be liable to all the charges with which it was affected. No one iota of difference is made by the interposition of the equitable jurisdiction of the court of equity; or the application of the principles of that court to uses in their present state; for admitting the estate for life to be merged at law, and a stranger claiming under the tenant in tail, to have gained an advantage by that means, the court of Chancery neither has or ever had

the power to take the advantage from him, except on the ground of fraud, &c.

The doctrine of these cases may be apposite to merger, in another point of view; and a reference to the opinions given, and distinctions taken, in *Treport's* case and *Bredon's* case be rendered necessary: for suppose A. tenant for life, and B. tenant in tail to join in a lease and release, or grant, or a fine, which does not create a discontinuance and such assurances to be made to the use of the tenant for life, remainder to the tenant in tail: will the estate arising under the use declared in favor of A. determine with the failure of the issue of the *tenant in tail?* or will it continue notwithstanding the death of the tenant in-tail without issue? From the best consideration of the point, it seems the estate for life will not merge, and that, on the contrary, it will be a continuing interest, agreeable to the distinction taken in the cases of *Treport* and *Bredon*; and it is observable that in *Beckwith's* case (*a*) it is said, that if tenant for life and B. in reversion or remainder levy a fine, the use shall be to A. for life, the reversion or remainder in fee; and the reason is, that each of them granteth that which he may lawfully grant, and *each shall have the use* which the law vest-

(*a*) 2 Rep.

eth in them *according to the estate which they convey;* and nothing can tend more strongly to shew, that the use to A. for his own life ariseth out of the estate for life which he himself conveyed, and not out of the reversion, as forming one entire and consolidated estate, through the medium of the merger of the estate for life.

It is concluded, that there will not be any merger, when several persons, who are the owners of distinct estates, join in conveying these estates by one and the same conveyance, and by the same limitation. This conclusion, if allowed to be right, becomes particularly important in the consideration of the effect of conveyances by tenant for life, jointly with tenant in tail, or in fee, when contingent remainders are interposed between their estates; for unless the estate for life ceases to be a continuing interest, it cannot be contended, with any appearance of reason, that the contingent remainders have lost the support of that estate. Should it be said, that they are not destroyed, merely by the conveyance of the tenant for life; since that estate is not annihilated, but continues in point of quantity though it may be altered in point of quality; it may on the other hand be objected, that though the estate for life is continuing to some purposes, yet it is blended with the inheritance, and forms part of

that estate; giving an estate, consisting of the united ownership, and that this union of ownership excludes the intervening contingent remainders. And contingent remainders will, it is apprehended, be destroyed by a conveyance made by these parties. (*a*) It is agreed, that a surrender by the tenant for life to the reversioner or remainder-man, is an effectual mode, for barring the contingent interest supported by that estate. Prudence therefore will dictate the propriety of taking a surrender from the tenant for life, to the reversioner or remainder-man; that no doubt may be raised on the continuance of the estate for life, or any question arise on the construction of the contingent remainders. Even a lease and release by a tenant for life to a reversioner, are considered as a surrender; and a surrender avoids the livery; affirming the reversion to be in the person to whom the surrender is made, and restoring to him the freehold.

So when the same person has an estate for life, with the reversion or remainder in fee, subject to interposed contingent remainders, the union of the estate of inheritance with the freehold, in a stranger, though he be a mere releasee to uses, will, as already

(*a*) It is understood there is a decision on this point by the C. B. on a case not yet reported.

observed, cause the merger of the freehold and the destruction of the remainders expectant on, and supported by, that freehold, as far as they depend on that estate of freehold. But the contingent remainders will not be destroyed, if there be any other estate of freehold, by which they may be supported.

In practice it has been doubted whether the concurrence of the tenant for life, with the owner of the next vested estate-tail, will not accelerate the right of possession under the estate-tail, so as to subject the possession to the incumbrances of the tenant in-tail.

In general, the estate vested in trustees for supporting contingent remainders, will guard against any possibility of merger; and frequent instances occur, in which the continuance of this interposed estate, would be an answer to a wife's title of dower, by keeping the freehold distinct from the *inheritance.*

As a caution against any prejudice to the tenant for life, from concurring with the tenant in tail in a recovery, the clause called the one hundred thousand pound clause has been adopted in practice. By this clause, a condition is annexed to the estate conveyed to the tenant to the writ of entry, stipulating that the estate should be void, unless this sum should be paid within a given time (being a period after the recovery is

intended to be completed;) and by the operation of this condition, the tenant for life will be restored to his former estate, unaffected by any of the incumbrances of the tenant in tail. The recovery will also remain in force, since it is sufficient that there be a tenant to the writ of entry at the time of suffering the recovery, though that seisin be afterwards defeated by a condition, or for any other reason.

In this place, it may be observed, that allowing to *Bredon's* case and *Treport's* case, the full force ascribed to them, this caution is not absolutely necessary, though no one can question its prudence.

The like object with the hundred thousand pounds clause may be attained by granting a particular estate of freehold, as for joint lives, and retaining the reversion, and adding a condition to defeat the estate which is conveyed to the tenant to the writ of entry: this seems the preferable mode, especially when there are any powers annexed to the estate for life, and these powers are to be preserved. Little or no doubt, however, can exist of these powers *being revived*, when the estate is restored by the operation of the condition; and the creation of a particular estate is decidedly to be preferred when the tenant in tail joins with the tenant for life, in making a tenant to the

writ of entry; and it is always advisable that he should join.

It may also be observed, that when no particular objection exists against the tenant for life joining in the voucher in the recovery, he should *be vouched:* as this voucher will be the means of bringing the case within the statute of 14 Geo. 2. c. 20. and of proving, even though the recovery deed should be lost, and the tenant for life should continue in possession, so as to rebut the presumption of a surrender, that the recovery was duly suffered; since there will be evidence of the concurrence of the persons, who were competent to suffer the recovery.

We have seen that when two persons, each having a several estate, expectant on the other, convey the land in which they have those estates to one person by the *same* conveyance, though the estates will be consolidated and no longer distinct, yet the land may be held under this conveyance, until such time as both the estates would have severally determined if they had continued in the tenancy of distinct persons. It is otherwise when a merger takes place. The merger of the particular estate in the reversion, causes the determination of the right of enjoyment under the particular estate, without respecting the period to which this particular estate was extended, and

might have continued if the estates had remained distinct.

In most instances also the estates must be taken at *distinct times*, or in other words by *distinct* acts, in order that a merger may take place. In other instances this doctrine will not have effect, because two estates are taken at the *same* time and by the *same* conveyance.

But when *one* and the *same* person has *several* estates, and of them one is in other respects qualified to merge, yet when these estates are kept distinct in him, by reason that one of the estates is privileged from merger under the statute of intails, or for the sake of some other person concerned in benefit under a joint-tenancy or a contingent remainder, there will be a merger when this person conveys these *several* estates even by one conveyance, and one entire *grant*. For as these estates were kept distinct, and exempted from merger for a particular cause, a merger will take place on the union of these estates in *another* person, or even in the same person as taking under a conveyance to uses; since the cause for exemption from merger no longer exists; and the rule *cessante causâ cessat effectus*, is applicable.

By this cricumstance alone, *Symonds v. Cudmore*, and the cases of that class, are to be distinguished from *Bredon's* case,

Treport's case, and the other cases of that class; for in *Symonds v. Cudmore*, &c. the same person had two estates, and they would have merged if one of them had not been an estate-tail. Therefore as soon as the protection from the estate-tail ceased, by the operation of the fine, the merger took place. In the other cases there were *several* persons, and each of them had a *distinct* estate, and they conveyed these estates by one joint act to one person, so as to transfer their several estates.

Though irrelevant to the doctrine of merger, yet as connected with the practice of suffering common recoveries, it will not be without its utility to add in this place, that a question frequently arises whether a person is tenant for life, or in tail; and if tenant for life, contingent remainders are not limited to his children. On suffering a common recovery to bar the estate-tail, if any, it is a general precaution to create a term to prevent the consequences of a forfeiture, considering the party as tenant for life. But as without further precaution the contingent remainders to the children would be destroyed, and it may be an object to preserve them, it is expedient in that case, and with a view of preserving the right under these contingent remainders, to limit an estate of freehold, so as to protect these remainders from de-

struction. For this purpose the lands should be conveyed to A. to the use of B. for *the joint lives* of A. and B. to the intent that he may be tenant of the freehold, and a common recovery be suffered. The remainder should be limited to the use of A. for the life of the grantor in trust for him. This estate in A. will preserve the contingent remainder, and at the same time be a protection against a forfeiture, since the right of entry will be in this trustee, and if he enter he must hold, in trust for the person suffering the recovery. This subject, it will be remembered, is examined and fully discussed, and the appropriate forms are given in the second volume.

It remains to be added, under this head, that the case of *Major v. Talbot*, (a) may, at first view, seem to militate against some of these distinctions; since according to the cited cases, the plaintiff held the possession, and had the cause of action in right of the wife, while he brought the action as assignee of the husband; but when the court treated the wife's life-estate as merged, they meant nothing more than united to, and consolidated with, the inheritance.

The true ground of the judgment is in

(a) Cro. Car. 285. Sir W. Jones, 305.

Croke, " that the action was well brought,
" being brought by the assignee of him
" who hath the inheritance, and so no
" prejudice to any ; and the estate for life
" being transferred with the fee, is there-
" by drowned and *confounded;* so as he
" being assignee of the whole estate, and
" *shewing all the matter* is good enough:"
not that the action was in the most approv-
ed form ; but in a form which on the
pleadings at large was sufficient, since he
has shewn his title as assignee of the wife
as well as of the husband.

And according to Sir *William Jones's* re-
port, the judges agreed that each passed
his own estate to the grantee ; but he adds
that which perplexes the decision, namely,
" and in regard to strangers who are to
receive prejudice, the estate of the wife
" continues; so that if any rent-charge or
" other charge was made by her, the gran-
" tee should hold this charged during the
" life of the wife: but in truth the parti-
" cular estate was merged in the rever-
" sion in fee. But then," it is added, " this
" is no prejudice to the lessee for years,
" for he is subject to a covenant as well
" after the determination of the estate of
" the wife, as in her life."

On this decision it is also observable that
the estate was drowned and confounded, as
far as it had been a distinct estate ;

although it was continuing in point of title: for after the husband and wife had conveyed to a third person, there ceased to be any existence of the freehold distinct and separate from the inheritance.

Eustace's(*a*) case is also to be remembered as belonging to this division, in application to persons being joint-tenants for life, and transferring their estate under a grant by them jointly.

(*a*) Supra.

CHAP. XIV.

In this, the concluding chapter, are to be considered,

First, *The Manner in which the Doctrine affects the Party himself whose Estate is merged;*
Secondly, *The Situation in which it leaves other Persons who have any Claims on the Estate which is merged, or any Interests derived out of that Estate;*
Thirdly, *The Effect which it produces on the Estate, in which the Merger takes place.*

As to the first head. The doctrine of merger may be injurious to the person in whose estate in reversion or remainder a prior estate becomes merged or absorbed. It has been shewn that in his character of a *trustee* this person may be protected by a court of equity, from the effect and consequences of the merger; but unless he can

derive a protection, from this or from some other source, he may, by reason of the merger, be subjected to a lease operating by *interesse termini*, to a *charge*, or to a *judgment*, as a present and immediate incumbrance, affecting the possession: while, without the merger, such lease, judgment, &c. would not have attached on the possession, until the prior estate had determined by effluxion of time.

An actual interposed term, as has already and frequently been shewn, would have kept the freehold and inheritance, though united, so far distinct, that the term would not become an estate in possession until the particular estate of freehold was determined in point of title, and by way of effluxion of time.

Secondly, Notwithstanding the merger of the particular estate, persons who have interests affecting the estate which is merged, will be left in the same condition in point of benefit, as if no merger had taken place. Therefore if tenant for life has made a lease, or has granted a rent-charge, or confessed a judgment, such lease, rent, or judgment will remain in force, and affect the land during the period of the estate which is merged; in like manner, as if that estate had continuance, exempt from the learning of the merger.

For the purpose of these estates, the

particular estate though merged has continuance in point of title, (*a*) although it is merged in point of law. It would not be consistent with the principles of justice, or with the fundamental rules of law, which indeed are founded on justice, that a man should by his own act, discharge himself from his own lease or other incumbrance. A person having such derivative interest, may be benefited, although he cannot be prejudiced by the merger of the estate out of which his interest is derived, or on which it is dependent. Therefore, when a tenant for life makes a lease for years at a rent, and the estate for life becomes merged; so that the relation of landlord and tenant ceases as between the parties; the remedy for the *rent* and for *covenants* annexed to the reversion, will cease with the reversion to which the rent and covenants were annexed and incident.(*b*) Nor does this doctrine impugn the maxim, that *cessante statu primitivo cessat derivativus*. This rule merely expresses that the derivative interest cannot be of longer continuance, than the estate out of which that interest is derived. Nor does the maxim mean to convey the idea that the

(*a*) 1 Inst. 338.

(*b*) Lord Treasurer v. Baron, Moor. 94. Webb v. Russell, 3 Term Rep. 393. Stokes v. Russel, 3 Term Rep. 678. As to surrenders, Perk. § 623.

derivative interest, may be impeached by its author. That it should be impeached would be contrary to the maxim, *that no man shall derogate from his own act;* and of the principle, which is one of the fundamental rules of title, that *quod meum est, sine facto vel defecto meo amitti vel in alienum transferri non potest.* (*a*)

In *Archer's* case (*b*) a tenant for life had made a feoffment, which was treated as a forfeiture of his estate for life. And Lord *Coke* makes this observation " Note, reader," after the feoffment, the estate for life, to some purpose, had continuance; for all leases, charges, &c. made by the tenant for life, shall stand during his life; but the estate is supposed to continue as to those only who claim by the tenant for life, before the forfeiture; but as to all others, who do not claim by the tenant for life himself, the particular estate is determined: also in *Coke* on *Litt.* the rule applicable to surrenders, and which is equally applicable to merger, is with the appropriate distinctions, stated in these terms.

" But herein are two diversities worthy " of observation. (*c*) The first is, that " having regard to the parties to the sur-

(*a*) 8 Rep. 92.
(*b*) 1 Rep. 66. b. see also, Cro. Car. 101.
(*c*) 1 Inst. 338. b.

"render, the estate is absolutely drowned."
"But having regard to strangers, who
"were not parties or privies thereunto,
"lest by a voluntary surrender they may
"receive prejudice, touching any rights
"or interests they had before the surren-
"der, the estate surrendered hath, in con-
"sideration of law a continuance. As if
"a reversion be granted with *warranty*,
"and tenant for life surrender, the grantee
"shall not have execution in value against
"the grantor, who is a stranger during the
"life of tenant for life; for this surrender
"shall work no prejudice to the grantor
"who is a stranger.

"So if tenant for life, surrender to him
"in reversion, being within age, he shall
"not have his age; for that should be a
"prejudice to a stranger, who is to become
"demandant in a real action. If tenant
"for life grant a rent-charge, and after sur-
"render, yet the rent remaineth, for to
"that purpose he cometh in under the
"charge *causâ quâ supra*. (a)

"If a bishop be seised of a rent-charge
"in fee, the tenant of the land enfeoff the
"bishop and his successors, the lord enter
"for the mortmain, he [the lord] shall hold

(a) Though the point is correct, the reasoning is not so; for the grantee of the rent cannot charge the surrenderee as *assignee*.

"it discharged of the rent; for the entry "for the mortmain affirmeth the alien-"ation in mortmain, and the lord claimeth "under his estate; but if tenant for life "grant a rent in fee, and after enfeoff the "grantee, and the lessor enter for the for-"feiture, the rent is revived; for the lessor "doth claim above the feoffment. But if "I grant the reversion of my tenant for "life to another for term of his life, and "tenant for life attorn, now is the *waste* "of tenant for life dispunishable; after-"wards I release to the grantee for life, and "his heirs, or grant the reversion to him "and his heirs; now albeit, the tenant for "life be a stranger to it, yet because he "attorned to the grantee for life, the estate "for life which the grantee had, shall have "no continuance in the eye of the law as "to him, but he shall be punished for "waste done afterward."

"The second diversity(a) is that for *the* "*benefit* of any stranger, the estate for life "is *absolutely determined.* As if he in the re-"version make a lease for years, or grant a "rent-charge, &c. and then the lessee for "life surrender, the lease or rent shall "commence *maintenant.* So in the case of "*Littleton* first, between the lessee and

(a) 2 Bulstr. 42.

" the second husband, the estate for life is
" determined; and secondly, for the bene-
" fit of the issue it shall be so adjudged in
" law. Here note a diversity when it is
" to the *prejudice of a stranger*, and when
" it is for *his benefit*."

Lord *Coke* again adds, " If a man maketh a
" lease to A. for life, reserving a rent of
" forty shillings to him and his heirs, the
" remainder to B. for life. The lessor grant
" the reversion in fee to B. A. attorns. A.
" shall not have the rent, for although the
" fee-simple do drown the remainder for
" life between them, yet as to a stranger,
" it is *in esse*; and therefore B. shall not
" have the rent, but his heir shall have it."
This last proposition shews, that when the estate of B. for his life is determined by effluxion of time, the rent shall be payable according to the effect of the original reservation, for by the grant of the remainder for life, the rent was suspended for the period of the life.

Under the same principle, the rights of exercising *powers* of leasing, and of cutting timber, cannot be accelerated to the prejudice of persons who have opposing interests.

So in Sir *Edward Peto v. Pemberton*,(a)

(a) Cro. Car. 101.

where the grantee of a rent-charge for life, accepted a term of years, which suspended the rent, and then surrendered the lease, it was held, that on the surrender, the rent was revived. For the court added, "by "the surrender and agreement of the par- "ties, the lease is absolutely determined, "and not *in esse*, and none of them can say "it is *in esse*; but a stranger who is to have "benefit thereby, may well say it is *in esse* "as to him; but *quoad* the lessor and les- "see, it is determined, and the possession "and interest is in him without entry."

So in *Lee's* case,(*a*) the interest of the person entitled under the *executory bequest*, remained in full operation, notwithstanding the merger of the estate, as far as it was vested in the person intitled subject to this executory bequest.

In short, all the cases prove that a stranger cannot be prejudiced by the merger. We must, however, except the case of *creditors* as between them and executors and administrators. Even in this instance(*b*) a distinction must be made between the rules of law and of equity, as will be more fully shewn under the appropriate head. After merger the term will no longer be assets at law, which can

(*a*) 3 Leo. 110.
(*b*) Moor 54.

be followed by execution at the suit of the creditors. The legal remedy of the creditors will be against the executors and administrators personally for a *devastavit*. Yet in *equity*, while the executor or administrator, or any person claiming as a volunteer under him, retains the inheritance or other estate in which the merger has taken place, a court of equity would, in all probability, relieve the creditors. As the executor has the power of alienation of the term of his testator; also as a husband who has a term in right of his wife as executrix, has a power of alienation over that term, there is a *devastavit;* and the term cannot be followed at law. In other instances of merger, and in all cases of surrender, the charge remains on the land specifically the same as if no merger or surrender had taken place.

The general conclusion to be drawn is, that though the particular estate becomes merged, yet all estates derived out of that estate, and all charges imposed on the same estate, and all interests created out of it by the person who was, at any time, the owner thereof, shall have continuance, notwithstanding the merger of the estate, on which the incumbrances were charged, or out of which they were created; in like manner as if the particular estate had continued.

An exception to this doctrine is found in

a note in a case in Moor.(a) "A woman "tenant in tail, made a lease for years not "warranted by the statute of Hen. 8.; then "she took husband and died. The husband "being tenant by the curtesy, surrendered "to the issue; and it was held that the "issue may avoid the lease in the life-time "of the husband, and yet the lease was "good as against him."

But as the doctrine is against first principle, it is at least questionable; Lord *Coke* has, it is believed, expressed a contrary opinion: but the passage which contains his opinion has not been found after a diligent research.

3dly, The effect of the merger on the estate in which the merger takes place, is to subject the reversion or remainder, thus accelerated, to all those burdens and consequences, which would have attached on that estate(b) in case the prior estate had not existed, and in the same order or series of time, as if that estate were determined. Thus the possession will be chargeable during the period appointed for the continuance of the particular estate, with all the incumbrances which affected that estate;

(a) Moor 8. Com. Dig. Estates B. 32.

(b) Symonds v. Cudmore, 4 Mod. 1. 1 Inst. 132. 338. b. Perk. s. 62, 63. Shelburne v. Biddulph, 4 Bro. Par. Cas. 594.

and also (by way of *acceleration*) with the incumbrances which attached on the reversion or remainder as thus accelerated.

Thus in *Errington* v. *Errington*(a) it was said by *Doddridge*, "if tenant for life "grants a rent-charge, and he in reversion "also grants a rent-charge, the tenant sur-"renders to the reversioner, the land shall "now be presently charged with two rents;" and *Coke*, Chief Justice, agreed the same to be so; and with reference to an estate merged, the chief justice admitted, that the merged estate should have continuance against all strangers: and *Doddridge* added, "true it is, that as against all strangers "which do not claim under him, it shall "have continuance, but not against "others."

These three divisions, and the general observations introduced under these divisions will be exemplified, and further illustrated by a review of the law of merger as applicable to persons in different relative situations.

The remaining part of this work will be

(a) 2 Bulstr. 42.

employed in a short examination by way of summary, of the general principles, and some of the leading points of law applicable to those thirty different heads which, in a former page, were proposed for examination.

And first,

As to *first and second mortgagees.*—The general rule of law, and of equity as adopting the law (for *æquitas sequitur legem*) is *qui prior est tempore, potior est jure*; in other terms, each claimant shall be preferred, and succeed according to the priority of his title. So that the first estate, however created, whether in order of time, or through the exercise of a power overreaching other estates, shall prevail against the second estate, and so on in progression according to the priority of each estate.

Also the *elder* title shall be preferred to the *puisne*, inferior or secondary title. Hence the law of *remitter.* This is a rule of *priority and posteriority of title,* as distinguished from the *priority and posteriority of estates* derived under the same title.

From the rule *qui prior est tempore,* &c, the utility and the advantage on the one hand, and in practice, the anxiety of obtaining the estate which confers a right to the possession of the lands mainly depend.

In general a term of years, most com-

monly an attendant term of years, and sometimes an estate of freehold, is of this description.

Whatever may be the estate which confers this right, it is of the first importance, and therefore of anxious solicitude with conveyancers, to obtain the command and controul of that estate. Hence the practice, carried in modern times to severe strictness, of requiring that terms which are outstanding, and which in point of fact, or as in the instance of terms created under powers, by construction of law, are attendant on the inheritance, should be assigned to attend the inheritance on every alienation, by way of sale, or of mortgage; and especially on mortgages.

On sales these assignments are required to guard against prior dormant incumbrances.

On mortgages they are required as well to guard against future incumbrances, as to protect against dormant incumbrances previously created.

Over a mortgagee a purchaser has the advantage, when he is put into the possession, or into the receipt of the rents; for then there is a notoriety of title, and this notoriety is constructive notice against future incumbrances.

Persons who buy reversions or remainders, and who do not obtain possession

of the land, nor receipt of the rents, are not in this fortunate condition. They stand on a par, and nearly, indeed wholly, on the like footing with mortgagees. While the general rule of *qui prior est tempore* is allowed and followed at law, there is another, and predominant rule of courts of equity, which treats *purchasers for a valuable consideration, and without notice*, as exempt from the jurisdiction of that court.

Courts of equity allow and act on the rule *qui prior est tempore;* as a rule of law, not to be altered or controlled by a court of equity. They leave the equitable rights in their subordinate condition, so as to make all equities equal, and leave with the person who has gained the legal title, the full benefit of that title. So that the legal estate, and equal equity, will prevail over another equity, though that equity be, as between equitable owners, the prior or preferable title. To illustrate these observations A. and B. are successive mortgagees, either of an equitable interest or of a legal estate; subject to prior terms, &c. In the creation of these mortgages, each has obtained a title to be preferred even in equity according to the order of the date of his security.

But let the second mortgagee obtain a legal estate, which confers the right to the

possession, and be capable of supporting the plea, that he is a purchaser for a valuable consideration without notice of the prior equity before the conveyance to him, and also before he had paid the price of his purchase; and he as a purchaser for a valuable consideration, and without notice, may shield his title and protect himself from prior incumbrances.

Notice of the prior incumbrance, either before the acceptance of the equitable title, or before payment of the price, would put it out of the power of the party to avail himself of the benefit of this plea.

The cases on this subject with their elucidation, principles, &c. are collected in Mr. *Powell's* work on mortgages.

It is not the object of this treatise to give a comprehensive or detailed view of this rule. All that is necessary or proposed is to shew the influence of the law of merger.

As an attendant term, or some other legal estate is the cause of protection from the prior charge, it is of the first importance to keep this term or other estate, on foot, or in other words exempt from the influence and learning on merger: for should the term which affords the protection become merged, then rents, debts, judgments, and other like incumbrances, against which the term was a protection, might

be enforced againt the inheritance, as accelerated into possession by the merger.

Hence the anxiety, to obtain the *elder* of the terms or other legal estates, and also to adopt those cautions of assignment of the first term to one trustee, and the second term to another trustee, or of the first and third terms to one trustee, and the second and fourth terms to another trustee; or the creation of a new term by way of underlease; which at once displays the anxiety and the advantage of having the command of the prior legal estate.

By superior diligence, in obtaining the legal estate, a second mortgagee often obtains a preference over a first mortgagee; and this priority may be gained even while a suit is depending in Chancery to settle the priorities.(*a*)

Let it also be remembered that priority depends more on the state of the title than on dates. For this reason a term created under a power may, in point of title, be prior to a term created by a settlement, but postponed by the exercise of a power, to when the term created by the settlement, must give precedence to the term created under the power.

Enclosure acts, &c. &c. give similar

(*a*) Robinson v. Davison, 1 Bro. C. C. 63.

priorities, over terms of elder date in point of creation.

This is an ample field for observation; but it would be equally ungenerous and unjust to treat of this subject at large, while other works contain a very full and satisfactory discussion of the subject. Formerly it was considered that a term once assigned to attend the inheritance might be safely permitted to remain in the trustee of that term, without any further assignment of the term. It was supposed that a term once assigned to attend the inheritance, would always attend the inheritance, as depending on the title to which this assignment was annexed; or at all events that a declaration *by the reversioner* without the concurrence of the trustee, that the term should be attendant, would supersede the necessity of an actual assignment.

As the writer of these observations was one at least, of those who introduced the practice of insisting on the actual assignment of terms, as preferable to a declaration of a trust of terms already assigned; and as the only safe and secure practice, he will add the reasoning by which he was influenced.

A term assigned for the benefit of a purchaser or mortgagee is a *shield* in his hands. Suffered to be outstanding it may be used as a *weapon* against him. And a purchaser

cannot safely dispense with an assignment of the elder of the terms. It is the sheet anchor of the title. While this term shall be outstanding, little or no advantage can be expected from puisne terms. Any person claiming an intermediate charge, and obtaining an assignment of the prior term, may impeach the title of the purchaser. Besides, future purchasers may require an assignment of this term. Without it the title will not be marketable; and when the deeds are not to be delivered to the purchaser, there is an additional reason for requiring an assignment of the term.

The trusts expressly declared of the term when assigned to attend the inheritance, give the priority. Till assignment without notice of prior incumbrances, the trustee will be a trustee for the several incumbrances, if any, and for the purchasers according to the priority in time of their claims. By taking an assignment of this term to a trustee for the purchaser, the priority will be changed; and the purchaser will be protected from any incumbrances, subsequent to the creation of the term, and prior to the purchase, provided he has not any notice of these incumbrances. This is peculiarly the advantage of taking an actual assignment of the eldest subsisting term. It is an advantage which a purchaser should never forego when an assign-

ment can be obtained without considerable difficulty, especially when the title deeds are not to accompany the purchase.

In general, terms should be assigned by a separate and distinct deed. It is frequently found inconvenient to have the existence of terms, disclosed by the deed conveying the inheritance; and even to have the creation of different terms disclosed by the same instrument.

It is also to be observed that a term unless actually assigned to attend the inheritance for the benefit of a purchaser, cannot be used by such purchaser as a protection against the dower of the wife of the person from whom he purchases, or under whom his title is derived. (*a*)

(*a*) Maundrell v. Maundrell, 10 Ves. J. 246.

3dly, *As to Bankrupts.*

To persons in *trade* it is of great benefit to have an attendant term in their title, and of consequence carefully to guard against the merger of such term; for it is fully settled that a purchaser from a bankrupt, who takes the assignment of an attendant term or other legal estate, may protect himself against the consequences of the bankruptcy, if he be a purchaser for a valuable consideration, and without notice of the bankruptcy: and the term or other legal estate, was not in the bankrupt at any time subsequent to the bankruptcy. (*a*)

In this place, and as connected with this and the former head, (*b*) it may be proper to observe that an attendant term will not protect against the demands of the crown. The decision on this point was contrary to the prevailing opinion of the profession; an opinion which had long regulated their practice. And though the law on this point may be considered as settled, yet it is founded on a nicety, and on a principle, not easily reconcileable to the mind of those who consider purchasers for a valuable consideration and without notice, to be placed beyond the power of the courts,

(*a*) De Gols v. Ward. Cas. Temp. Talb. 65.
(*b*) The King v. John Smith, Mar. 2. 1804.

to take from them the advantage of any legal estate, they may have obtained.

To support the decision in the case of the *King v. John Smith*, it is necessary to contend that the crown may follow the trust or equity of the term as part of the inheritance, by its execution in the same manner, as if no assignment had been made.

It is impossible for the crown to impeach the legal operation of the assignment: and it is singular that if the debtor had been the owner of the legal estate in the term, his assignment prior to the teste of the writ of extent, would have prevailed against the crown. (*a*) The sole ground, therefore, of supporting the decision is, that the crown follows the trust of the inheritance; and not the trust of the term, except so far as it is part of the inheritance; and that the legal estate conferred by the term, will not protect a purchaser for a valuable consideration, and without notice from the lien, or demand of the crown, attaching on the inheritance, as consisting partly of the legal estate of inheritance, and partly of the benefit of the trust of the term.

The material parts of the *judgment* of the Lord Chief Baron are these: "In deciding "according to the course of the common "law, I think it clear that an outstanding

(*a*) Sir Gerard Fleetwood's case, 8 Rep. 171.

" term cannot defeat the king's process by
" extent. In courts of equity it has been
" said that a purchaser without notice, is
" a person favored by that court. Perhaps
" it may be a sufficient answer to say, that
" in the present instance we are not in a
" court of equity. The question is, what
" ought to be our decision according to
" the common law? This question could
" not be decided in a court of equity. They
" could not sue for a decree. When a
" court of equity is resorted to, and this
" is the situation of the parties, the court
" does nothing but stand *neuter* between
" such parties, and leaves them to make
" the most of it.

" Now I think on the whole, in the first
" place the land is chargeable that has been
" in the hands of the king's debtors; and
" from the cases that have been decided,
" it is sufficiently clear, that the *term is;*
" it is the whole interest in the land, whe-
" ther it be divided or not; and so like-
" wise in uses and trusts: and from what is
" said by *Lord Hale*, I infer the same
" doctrine is applicable to the actual case
" now before us."

4thly, *As to Persons who have Reversions and Remainders.*

The general effect of merger is to accelerate the right to the possession under

the estate which was a reversion or remainder, by the annihilation of the particular estate. With the exception of those observations applicable to terms of years, which make a difference between a term in reversion, as distinguished from a term in remainder, the same observations which are relevant to a reversion or a remainder, are equally relevant to the other of these interests. The material difference is, that unless there be a particular estate, divided from the inheritance, there cannot be any merger. (*a*) Hence the inquiry whether the freehold is united to or disjoined from the inheritance, and hence the case in one of the books, where it is said by the whole court except *Port*: 'If I enfeoff to two, to hold to them and the heirs of one of them, (*b*) [who has the freehold] he cannot surrender to the other because of the joint possession; for there the freehold cannot merge in the reversion, because he who had the fee is jointly seised of the possession with him who surrenders; and no surrender can be properly made, but where he who surrenders gives the possession to him who takes by the surrender. 23 H. 6. 51. So it is said, land was given to R. and I. his wife, and

(*a*) 1 Inst. 182 b.
(*b*) Brooke Surr. 13.

the heirs of R., and R. died having issue a daughter named *Cicely*, who married O. and afterwards I. who survived, gave the land to C. and O. her husband in tail, the remainder in fee to O. Query, If this be a surrender? It seems not, because the husband is joined with his wife, 39 E. 3. 29.

It is frequently a subject of enquiry whether there be any particular estate; for without a particular estate there cannot be a reversion or remainder; also whether there be a particular estate divided from the inheritance, or an inheritance, composed of that portion of interest, which is supposed to be a particular estate.(*a*) Some instances of this sort have been already exhibited. It remains only to add, that there cannot be any merger unless there be a remainder or reversion in which the particular estate may merge.

Between the tenant of a particular estate and a remainder-man, there is not any tenure or seignory. There is some reason, therefore, to contend that two terms when one is limited by way of remainder, may remain distinct, since as to terms there is a clear intention that the time of one term, should be distinct from and by way of increase to the other term. But even this reason is answered by stating that the times of the terms

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(*a*) 1 Inst. 182. b.

are concurrent, unless one of them is granted by way of reversionary interest.

The effect of merger, as already noticed, is to accelerate charges affecting the reversion or remainder, as a consequence of accelerating the right to the possession, under the reversion or remainder. Also it is a rule of law, when there are several particular estates with reference to the lands as an intirety, there will be a distinct reversion of each share in which there is a distinct particular estate. It is a maxim that when particular estates are several, the reversion of them is several. (*a*) This rule does not extend to remainders, though contingent remainders of each share are liable to be defeated by the determination, or by the destruction, of the particular estate in that share.

We have also seen that rents and covenants annexed to a particular estate as a reversion, expectant on another estate derived out of that rever ion, will cease with the merger of the reversion to which such rent and covenants respectively are annexed.

And the following points may be added from *Dyer*. (*b*) Where land is given to two and to the heirs of one, the heir shall be out of ward · the reason is thac although he

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(*a*) Litt. s. 283.
(*b*) Dyer, 10 a. b.

who hath the fee-simple, hath only an estate for life as between him and his companion, yet as between the lord or a stranger, he hath the fee-simple. And it is not impertinent to say, that a man may be tenant in fee-simple as to one, and tenant for life as to the other in respect of their different interests: as if tenant for life grant a rent-charge, and he in reversion grant another rent-charge, tenant for life surrenders, the reversioner shall hold the land charged with two rents; under the one he shall be tenant in fee-simple, and as to the other he shall only be tenant for life.

And so also is the law, if the lease be made to two, afterwards the lessor grants the reversion to one of them, in fee, and he accepts the deed, which is attornment in law; if the grantee die, his heir shall be in ward, because the reversion was holden: and then is added a point which is no longer law, the other joint-tenant who survived, shall have the entire land by the survivor, and he was never tenant to the lord, as he would be if the remainder was in tail, remainder over in fee, &c.

5. As to tenants by intireties.

6. As to joint-tenants.

7. As to tenants in co-parcenary.

8. As to tenants in common.

(a) Essay on Estates, Introduc. Chap.

These four divisions furnish heads of contrast.

Husband and wife are the only persons who can be tenants by *intireties*.(a) This tenancy must be created, or take effect, during coverture. This species of tenancy owes its qualities to the *unity* of the persons of husband and wife. Each, in intendment of law, has the intirety: and a particular estate in one of them of the intirety may merge in the reversion or remainder of that person; for each has a power of alienation over the intirety, subject only to the right of the other.

It must always be remembered, that tenancy by intireties is peculiar to the ownership of husband and wife; and to them only when the conveyance is made to them during the coverture.

In *Purefoy v. Rogers*(a), it was agreed, that the estate of which the wife alone was seised, was merged by the accession and acceptance of the fee to her and her husband as tenants by intireties.

Thus, although the wife is solely seised of the freehold, yet on the purchase of the inheritance by her and her husband, the intirety of the freehold will merge in the inheritance, even to the exclusion of a contingent remainder; subject nevertheless to

(a) 2 Lev. 39.

the right of the wife, if she survive, to restore he elf to the freehold by waving the inheritance.(*a*)

Merger indeed seems to flow from ownership;(*b*) from the right to alien: and therefore when husband and wife are tenants by intireties, as neither can alien to the prejudice of the other, it is reasonable there should not be any absolute merger of the estate of the wife.

The intirety of lands held by a husband for a term of years in right of his wife, will merge in a freehold limited to him and his wife, for the husband has the intirety of the term, as well as of the freehold.(*c*)

In assize the case was, that a lease was made to W. for term of his life, the remainder to P. in tail, the remainder to T. in tail, the remainder to the right heirs of W. and afterwards W. enfeoffed P. and *his wife* in fee:(*d*) now T. cannot enter, for he had not the immediate remainder; but if P. die without issue now T. may enter for the alienation to his disherison. Per Wicking, and not denied; and so see that it was not a surrender, because the feme was joined with P. who was in the remainder;

(*a*) Purefoy v. Rogers, 4 Mod. 284. 2 Lev. 39.
(*b*) 1 Inst. 299. a.
(*c*) 2 Rolle Abr. 495.
(*d*) Brooke Surr. pl. 3.

but if she had not been joined, then it seems to be a surrender, *for tenant for life cannot enfeoff him in reversion or remainder,* 41 E. 3. 21. so as to give a *continuing estate.*(a)

But Perk. (c) has this point: " If there " be lessee for life of land, the remainder " in tail unto a stranger, the remainder " over in tail unto another man, the re- " mainder unto the right heirs of the lessee, " and the lessee doth thereof enfeoff him " in the first remainder in tail, and his " wife in fee, and the husband dieth without " issue, living the lessee, and he in the " second remainder doth enter and put out " the wife, she shall have an assize; because " she shall have the land during the life " of the lessee, who was her feoffor; *tamen* " *quære.* And if he in the second remain- " der in tail, dieth without issue, living " the wife, then he shall retain the land unto " him, and his heirs for ever, &c." And the *joint-tenants* have also one freehold. Joint-tenants, in the language of the law, are seised *per my et per tout.*(d) *Their seisin* is entire: and a release or surrender as such, to one of them, will operate for the benefit

(a) Perk. § 621.
(b) Ibid.
(c) Brooke Surr. pl. 20.
(d) Litt.

of both; but on a grant to one of them by the owner of a particular estate, there will be a merger only to the extent of the share he can alien. So if one has a particular estate, and then there is a grant to him and another jointly, there will, to the extent of the shares which he has for the purpose of alienation be a merger. It has been shewn that a joint-tenancy will not be defeated in the same instant, and by the same act, by which it is created, when all the estates are limited by the same deed. Thus under a grant to two jointly for their lives, with several inheritances by the same deed or will, the freehold will remain in joint-tenancy: so if the grant be to several for their lives as tenants in common, with remainder to them in fee, as joint-tenants, the inheritance will remain in joint-tenancy, for such was the original constitution of the particular estate in one instance, and of the inheritance in the other instance.

These are examples in which the intention seems to be respected.

But when a man has an estate for life,(*a*) and accepts a grant to him and another jointly in fee, there will be a merger for one moiety, and a severance of the joint tenancy.

So when a grant is made to two jointly,

(*a*) 1 Inst. 182. b. The sections 618, 619. in Perkins to the contrary, are not law.

for their lives, and the reversion is afterwards purchased by one of them, there will be a merger for a moiety and a severance of the joint-tenancy.(a)

So there will be severance and merger, when tenant for life grants his estate for life to one of two persons, who are joint-tenants of the immediate reversion or remainder in fee;(b) for the reversioner or remainder-man cannot be tenant to himself.

And Lord *Coke*(c) in his report of *Wiscot's* case, maketh a note, that from the resolution of that case, if tenant for life granteth his estate to him in reversion and a stranger, the same is a surrender for one moiety.

For it appeareth from the resolution of that case, that by getting the reversion, and particular estate immediately preceding it, at several times, there was a merger: for the reversion expectant on the particular estate cannot remain in him distinct and grantable over; but the one shall drown the other, and the benefit of survivorship not be regarded.

The resolution in *Wiscot's* case solves a doubt in 7 H. 6.; and *Wiscot's* case appears to be the first resolution, which affirms the severance of the jointure, and the passages

(a) Perk. § 81. contra in § 618 and 619, which are not law.
(b) 1 Inst. 182. b.
(c) 2 Rep. 60.

in Perk. § 618, and 619. are to be accounted for on the ground, that the law had not been fully and finally settled at the time when *Perkins* collected his points, *for* he states the law differently, in different parts of his work.

Also in *Brooke* (*a*) it is stated that where a man leased for life rendering rent, and afterwards the tenant for life granted his estate to the lessor and two others; the best opinion, is that this is a surrender for the third part; for when the fee and the freehold *come together*, one determines the other, and so the jointure determines; and they are tenants in common: and yet it is observed, the opinion of *Perkins* in his book is, that it is no surrender for any part, for the advantage of the other two; and even *Perkins* himself (*b*) states that it has been holden, that if the lessee for life grants his estate unto his lessor, and a stranger, that by force of this grant, they are joint-tenants. But this is contrary to *Wiscot's* case.

And it has also been held, that when the reversion descends to one joint-tenant for life; or the one joint-tenant for life pur-

(*a*) Surr. pl. 11.
(*b*) Perk. § 84.

chases the reversion, the jointure is severed and the estate for life drowned; (*a*) and not like where two purchase to them and the heirs of one of them; for there the *agreement at the beginning*, was that the estate should continue, and it was cited to be so ruled in *Morgan's* case; and that it was ruled between *Portley and Portley* that it was all one; where the one purchaseth the reversion, and where the reversion descends to the joint-tenant.

So if an assignment of a term be made to one of several joint-tenants (*b*) there will be a merger for the aliquot part in which the term and the inheritance are united. In short, a joint-tenancy may be severed by merger. The severance, however, will be so far only as it creates an inequality of rights.

And the case (*c*) of *Block v. Pagrave and Pagrave*, in treating the term of the mother as merged for more than one moiety, was not well considered.

A tenant for life of one third accepted a conveyance of the intirety to himself and a trustee, and the heirs of himself: there was a severance for one third, and the wife

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(*a*) Taylor and wife v. Sayer, Cro. Eliz. 743.
(*b*) See Ralph Bovey's case, Vent. 193.
(*c*) Cro. Eliz. 532. 1 Str. 17.

became dowable. He ought to have joined in the conveyance,(*a*) and to have raised the joint-tenancy by an use.

Lord *Coke* indeed states (*b*) "that if a "lease be made to two men for term of "their lives, and after the reversion granted to them two, to the heirs of their two "bodies, the jointure is severed, and they "are tenants in common in possession." This is at least questionable, and the proposition seems to be against the principles of law. It is admitted that the grantees will have several inheritances; but as they have a joint freehold, under the grant of the reversion, it is quite unintelligible on what ground, except that noticed in the next page be well founded, there should be an immediate severance of the tenancy of the freehold; although it is acknowledged there would be an immediate merger. To make the point obvious, and consistent with the principles of law, and in order to induce the conclusion of severance, the case should state the grant of the reversion to be to the tenants for life, as tenants in common of the freehold, as well as of the inheritance in tail.

But it is not to be forgotten that Lord *Coke* puts this case: (*c*) "If lands

(*a*) Cro. Car. 285. Jones. 305.

(*b*) 1 Inst. 182 b.

(*c*) 299 b.

" be given to two men and to the heirs
" of their two bodies begotten, and the
" donor confirmeth their two estates in the
" land, to have and to hold the land to
" them two and to their heirs: in this case
" some are of opinion that they shall be
" *joint-tenants* of the fee-simple, because
" the donees were joint-tenants for life,
" and (say they) the confirmation must enure
" according to the estate which they have
" in the possession, and that was joined.
" But others hold the contrary. For first,
" they say, that the donees have to some
" purposes *several* inheritances executed, (*a*)
" though between the donees survivor shall
" hold for their lives. Secondly, they say,
" that when the whole estate which com-
" prehendeth several inheritances, is con-
" firmed, the confirmation must enure ac-
" cording to the several inheritances,
" which is the greater and most perdurable
" estate, and therefore that the donees shall
" be tenants in common of the inheritance
" in this case."(*b*)

But " if a lease for life be made to two
" men in several moieties, and the lessor (*c*)
" confirm their estates in the land, (*d*) to
" have and to hold to them and their heirs,

(*a*) See observation, supra.
(*b*) This point is at least doubtful.
(*c*) 1 Inst. 299. b.
(*d*) Shep. Touch. Ch. Confirmation.

" they are tenants in common of the in-
" heritance." Lord *Coke* has assigned the reason, namely, " the confirmation shall " enure according to the quality and " nature of the estate, which it doth en- " large and increase."

So " if a lease for life be made to A. the " remainder to B. for life, and the lessor " confirm their estates in the land, (*a*) to " have and to hold to them and their " heirs, A. taketh one moiety, to him and " his heirs, and therefore of the one moiety " he is seised for life, the remainder to B. " for life, and then to him and his heirs: " of the other moiety A. is seised for life, " the immediate inheritance to B. and his " heirs; because as to the moiety which B. " takes, the same is executed: as if the " reversion be granted to tenant for life, " and to a stranger, it is executed for one " moiety (as hath been said before) and " therefore in this case they are tenants " in common."

And it is to be remembered that there will not be any merger when both estates are limited by, or arise from the same instrument; and the effect would be to sever the tenancy.

(*a*) 1 Inst. 299. b.

Rogers v. Downs(a) belongs to this division. It proves that there shall not be any merger when a consequence flowing from it would be to destroy the quality of one of two estates, limited by the same deed.

In this instance two persons were joint-tenants for their lives, with several inheritances to them, and the freehold was protected from merger, on account of the joint-tenancy.

Coparceners are as one heir. They have a joint seisin though the share of each is descendible to his or her heirs. Each has the intirety, so far that one may accept a release from the other. A release or a surrender to one may operate for the benefit of the other. But in reference to merger, each has a distinct share, as a distinct inheritance; and the merger of a particular estate, will not extend to any greater share than the coparcener has for the purpose of alienation. Therefore note by all the justices of the Common Pleas; if a man lease land to two for term of life, and has issue two daughters and co-heirs, and the tenant for life grant his estate to one of them, this is a surrender only for a moiety.(b)

But if lessee for life die, and the rever-

(a) 9 Mod. 293. Wiscot's case, 2 Rep. 60.

(b) Brooke Surr.

sion descend unto two co-parceners, and one of them take husband, and the lessee grant his estate unto the husband and wife, the same shall enure by way of *grant for the whole.* (a) This is in order to preserve the interest of the husband.

Tenants in common have distinct shares, and each distinct share is as it were a distinct tenement; and the doctrine of merger has application to each share as if it were a distinct tenement.(b)

Suppose A. to have the inheritance of one third, and B. to have a term in one third, not created out of this particular third, but out of the entirety. As A. has not the identical share of B. the term if assigned to A. would merge for a third of a third only; that is, the term is in one third only of his identical share of the inheritance. In this place, however, the case of *Church and Edwards*, and the criticisms on that case must be called to mind.

There are several authorities which prove that a joint-tenancy of the freehold may, by merger, be converted into a tenancy in common of the possession.

Thus in *Wiscot's* case three were tenants

(a) Perk. 85.

(b) Sir Ralph Bovey's case, 1 Vent. 1 Inst. 299. a. b.

for life, and the reversioner levied a fine to one of them, and it was resolved that the jointure was severed. (*a*)

So according to Lord *Coke*, (*b*) if a man maketh a lease to two for their lives, and after granteth the reversion to one of them in fee, the jointure is severed, and the reversion is executed, for the one moiety; and for the other moiety, there is tenant for life, the reversion to the grantee.

And the right of enjoyment under a tenancy in common of the freehold to two, may, by merger of that freehold in the inheritance, as held by two persons jointly, be converted into a joint-tenancy; allowing the example, presented by the learning of confirmations, to be, from the nature of the assurance, an exception.

But when *one* of several persons, being a joint-tenant or tenant in common of the freehold, accepts a grant to himself jointly with one or more person or persons, being a stranger or strangers, there will be a merger; and there will be a merger only to the extent of the share in which this person has an equal share in the freehold, and also in the inheritance.

On the case of *confirmation* cited from

(*a*) Rep. 60.
(*b*) 1 Inst. 182. b.

1 Inst. 299. b. in which the author states, "if a lease for *life* be made to two men by "several moieties, and the lessor confirm "their estate in the land; to have and to "hold to them and to their heirs, they are "tenants in common of the inheritance; for "regularly the confirmation shall enure "according to the quality and nature of the "estate which it *doth* enlarge," these general observations may be offered.

Under this confirmation the confirmees were at first seised as joint-tenants. As soon as they were seised of the inheritance, the union of the freehold with the inheritance occasioned a severance of the tenancy of the inheritance; each moiety of the freehold occasioning a merger of the corresponding share of the inheritance. Had the confirmees been owners of an estate for years as tenants in common, the joint-tenancy of the inheritance would not have been severed. But if they had been joint-tenants of the freehold, and the inheritance had been limited to them as tenants in common, the freehold would have merged in the inheritance; and the estate of inheritance must afterwards, and necessarily, have given a quality to the ownership. Whenever the quality of a particular estate is altered by its union with another estate, it

must be in consequence of a merger of the particular estate; and it follows that till the merger is complete, no alteration in the quality of the ownership, under the particular estate, is effected. In general, the rule is, that after merger, the nature of the ownership must be determined by the *quality* of the estate accelerated by the merger. The cases of confirmation assume, and justly, the converse of this proposition—for the freehold to be enlarged must decide the quality of the estate when enlarged. This case, and many others not intelligible on a first impression, owe their decision, to the rule that *several freeholds make* of necessity several reversions.

And a severance of the freehold is a severance of the reversion.

Suppose A. and B. to be tenants in common, in co-parcenary, or joint-tenants, and to convey to C. and D. as tenants in common or even as joint-tenants.(*a*) Each grantee derives his title as to part under A. and as to part under B. It follows that in case of alienation by tenant in tail of one moiety by defective means, the issue or person claiming under him, cannot demand this moiety against C. or D. alone, but must pursue

(*a*) Litt. s. 302. 1 Inst. 191. b.

several claims as to part against C. and as to other part against D. This proves the mode in which the act of merger would operate; for instance, a term in the part of A. could never merge in the reversion of the part of B. It was, therefore, necessary to adduce this example to illustrate the mode of operation of a conveyance under these circumstances, and shew the nature of the title which it confers.

In *Rogers* v. *Downs*, and others, (a) Lord *Hardwicke* is made to say, "an estate "for life in jointure cannot sink into an "estate of a different nature and quality "as tenancy in common is;" and he says, "this is agreeable to the resolution in "*Barker and Giles*, (b) which see." These propositions must be understood with the qualification, that both estates are the subject of the same deed; for a conveyance of the inheritance to two as tenants in common, or as joint-tenants, will admit of a merger, according to the distinctions in *Wiscot's* case. (c)

But when there is one estate only, and not several estates; as to two and the heirs

(a) 9 Mod. 293.

(b) 2 P. Wms. 280.

(c) 2 Rep. 60. and the distinctions in 1 Inst. p. 184. a. and 299. b.

of one of them; or to two men and the heirs of their bodies; the freehold may be in *joint-tenancy* and the inheritance be several in one; or each may have a several inheritance of a moiety. Hence the doctrine advanced by *Littleton*, § 283. and the comment of Lord *Coke*. In this case of *Littleton*, no division between the estate for lives and the several inheritances exists: for the case was of a gift to two men and the heirs of their bodies; and it is asserted they cannot convey away the inheritance, after their decease, for it is divided only in supposition and consideration of law, and to some purposes the inheritance is said to be executed.

However, immediately after the death of one of the tenants of an estate to two men, and the heirs of their bodies, the inheritance of one moiety will become a remainder, divided from the particular estate.

9th, As to Persons who have Remainders in contingency.

These remainders may be considered as they are interposed between a particular estate and a vested remainder; or simply as they are dependent on a particular estate. In their original limitation they will be

good, unaffected by the learning of merger, notwithstanding there be an *immediate* union of the particular estate and the remainder, or of the particular estate and the reversion; provided this union be in the same transaction, or the result of the same act, as creates the contingent remainder: for an union under these circumstances, will be subject to a capability in the remainder, to vest and to separate the estates thus united. It is said the estate will open so as to admit of the interpolation of the remainder when it can vest.(*a*) Any subsequent union, under a distinct act of law or transaction, causing the merger of the particular estate, will be a destruction of the contingent remainders, by taking from them the support of the particular estate. Under the next head it will appear that contingent interests by way of executory devise, cannot, under any circumstances, be destroyed by merger, though they may, in some cases, be annihilated by extinguishment. Under that division also, the law as applicable to contingent limitations of terms of years, will be noticed.

On a devise or grant (*b*) to two and the heirs of the survivor of them, you may sup-

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(*a*) Lewis Bowles' case, 11 Rep. Plunket v. Holmes, 1 Lev. 311.

(*b*) Butler's Co. Litt. 191. a. n. 78.

pose the donor or reversioner and the donees to join together in a common conveyance by lease and release or bargain and sale. The estate for life of the donees will unite with the reversion, and the contingent remainder be destroyed; and the fee effectually conveyed to the purchaser. In this instance there will be an union, though it should seem there will not be any merger. (a) And yet the contingent remainder will be destroyed by this union.

Had the remainder been to a person ascertained, and he had joined in the conveyance, the operation of the conveyance, would, as against him, have been by way of release of his interest or possibility.

But an interest to a person not ascertained, as to the survivor of several persons, or to children or other persons attaining a given age, or answering any other description, cannot when this interests is by way of legal ownership, be released. It may be bound by fine and feoffment or common recovery, operating by estoppel. The like interests of an equitable ownership, may, in equity, be bound by conveyance operating as a *contract*.

It may be observed that if A. be tenant for life with remainder to B. for life, with

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(a) Vick v. Edwards, 3 P. W. 372.

remainder to his first and other sons in tail, with reversion in fee to C. and the reversion in fee vest in B., the estate of B. for his life will merge in his reversion in fee; but it will not exclude the contingent remainder, while the estate of A. shall continue; for the continuance of the preceding estate for life in A., will preserve these remainders, but the contingent remainders will on their vesting be accelerated as a consequence of the merger.

And a contingent remainder will be destroyed, though the merger be not absolute and unavoidable; as in the case of an estate limited *to a woman who has the reversion and is married.*

Plunket and Holmes, is an authority that merger will not take place in destruction of a contingent remainder, when the fee descends to the heir on the death of the person by whose will the contingent remainder is created. This case supposes the heir to be the donee of the particular estate by which the remainder is supported.

But the *purchase* of the estate of freehold by the heir, and conjoining the same with his inheritance, will occasion a merger, and the destruction of contingent remainders which depend for support on the particular estate which is merged.

It is proper to add that there is a

difference between joining the inheritance to the particular estate, by *the same conveyance as limits the intermediate contingent remainder,* and an accession of one estate to the other by a *distinct and subsequent act or conveyance;* for in the latter case the contingent remainder will be *destroyed,* though not in the former.

It has even been adjudged that in the latter case the descent of the inheritance on the person having the particular estate, would destroy the contingent remainder, where the descent has been subsequent to the commencement of the particular estate.(*a*)

But a descent of the fee on the tenant for life will not hurt the contingent remainder, where the particular estate and the descent take place *at the same time* and are derived from the same person: as when lands are devised to A. for life, remainder over on a contingency, and on the testator's death the reversion descends to A. as his heir. (*b*)

The case of *Wood and Ingersole,* Cro. Jas. seems contra; but the observation on the last case in T. Jones, 79. Pollexf. 481. corrects its authority.

(*a*) Purefoy v. Rogers, 2 Saund. 380. Kent and Harpool, 1 Vent. 301. Hooker v. Hooker, Ca. Temp. Hardw. 13. T. Jones, 76.

(*b*) Archer's case, 1 Co. Plunkett and Holmes, 1 Lev. 111. Boothby v. Vernon, 11 Mod. 147.

It would be a great omission not to apprise the reader that the subject is fully discussed by Mr. *Fearne* in his Essay on Contingent Remainders; (*a*) and the author most learnedly and ingeniously states the several distinctions, explains the reasons on which they depend, and endeavours to reconcile all the cases on this nice subject.

The result of the case of *Wood and Ingersole* is, that an estate for life devised to an heir at law, is merged by the descent of the fee to him from the testator, notwithstanding the interposition of contingent remainders; and the remainders limited *contingently* on the estate for life, are destroyed by the annihilation and merger of the particular estate. But the case of *Wood v. Ingersole*, is no longer considered as an authority to be followed.

10*th*. *As to Persons who have Interests, by Way of Executory Devise, or by Executory Bequest.*

No one can destroy an executory interest, merely as such, in another person, either by alienation, merger, or surrender.(*b*) This is one of the peculiar qualities of an interest under an executory devise of a freehold interest, or an executory bequest of an interest of chattel quality. The point to be exa-

(*a*) p. 111 to 118, 2d Ed.

(*b*) Pells v. Brown, Cro. Jac. 590.

mined is, whether an executory interest by devise or by bequest, or an executory interest under a *springing or shifting use*, (for they are of the same nature, and, in this respect, subject to the same rules) may cease by the union of the executory interest in the person who has the estate, which is subject to that interest. It is clearly settled, that the same person may, under the *learning of uses*,(b) though not under the rules of the common law,(c) have a power, and also the estate which is subject to the power. But when a person has a power, and the fee afterwards vests in him, the fee will, it has been supposed, extinguish the power:(d) It is also settled by several cases, that the same person may have as distinct interests, a fee, and also an interest to operate by *executory devise* to defeat that fee. Hence the decisions in *Goodright v. Searle*,(e) and *Goodtitle v. White*.(g) It is impossible to predicate of these cases, so as to define their point, by any other solution of their effect. Hence, although a person has a fee by descent, *ex parte paternâ*, he may have a distinct interest under the executory devise by

(b) Sir Edward Clere's case, 6 Rep. 18. Maundrell v. Maundrell, 10 Ves. Jun. 246.

(d) H. Black. Cross v. Hudson, 3 Bro. C. C. 31.

(c) Goodill v. Brigham, 1 Bos. and Pull. 192. Sugden on Powers, 90.

(e) 2 Wils. 29.

(g) 15 East. 174.

descent *ex parte maternâ*, to defeat that fee; so that the fee which was descendible to the heirs *ex parte paternâ*, may by the operation of the executory devise, and the eventual substitution of the interest under the executory devise, be a fee descendible to the heirs *ex parte maternâ*; or the converse may be the case: for a person may have the fee descendible *ex parte maternâ*; and an interest, operative by way of executory devise descendible to the heirs *ex parte paternâ*. These cases are referable to the learning of extinguishment, rather than the law which applies to merger. It is difficult to say any thing of these cases, without treating them as *anomalies*. Consistently with principle, it might have been well decided, that the same person could not at *one and the same time*, have the fee and an executory interest to defeat that fee. It was acknowledged by the court in *Goodtitle v. White*, that the point might originally have been adjudged either way; (a) but as *Goodright v. Searle* had decided the law in favour of the operation of the executory devise, as a continuing interest, that decision was followed in *Goodtitle v. White*. This therefore is in the view of the author of this Treatise one of those unfortunate cases in which a

(a) The language as reported is only, " It would possibly " have been of no great prejudice when the question was first " raised, if two such interests in the same person had been held " to coalesce."

decision founded, as appears from the language of the judges, as reported by *Wilson*, without a correct review of first principles, has established a rule of property, which, though a matter of indifference in itself, is mischievous, in disturbing a system, and introducing anomalies, furnishing arguments for other cases: and thus leading, step by step, to a deviation from the fundamental rules of law. The court, however, by whom *Goodtitle v. White* was adjudged, thought the decision in *Goodright v. Searle*, not inconsistent with any principle of law.

Although the estate and the executory interest are distinct in the same person, yet any alienation by the owner of these two interests, either by demise for years, or in fee, would, beyond all doubt, be binding on both these interests: and in the case of a demise for years, there would arise the absurdity that the demise would, in the first place, operate on the seisin or estate, and ultimately on the executory interest, when that interest should become vested. Thus there would be the anomaly of a lease, with the reversion in the lessor, descendible to his heirs, *ex parte paternâ*, and when the executory interest should vest, there would be a reversion in the lessor, descendible to his heirs *ex parte maternâ*.

Again, supposing A. to die, this further absurdity would arise: his estate would de-

scend to his heirs of one class, and the executory interest to the heirs of the other class, and the rent which on one day, would belong to one class of heirs, might, on another day, belong to another class of heirs.

But although these interests are distinct, while they are in the original owner, yet, after he has aliened the fee, the two interests will be united; for the conveyance will operate, first, as a transfer of the estate, and secondly, as a release, by way of extinguishment, of the interest under the executory devise, &c.

But although the executory interest cannot be defeated by merger, yet a term of years, which is subject to an executory bequest, may merge in the inheritance, descending to the first legatee under that bequest. But notwithstanding the merger the interest under the executory bequest may arise and vest, whenever the event upon which it is to give a right to the ownership of that interest, shall happen.

In *Vincent Lee's* case, already cited, and which is also reported by *Moor* under the name of *Lee v. Lee*,(*a*) a man devised a term for twenty-one years to A., and if he died within the term, then to B. for the residue

(*a*) Moor 269.

of that term: and the inheritance was devised to C. in tail, with remainder to A. in tail, with remainders over; and C. having died, the term in A. merged in his inheritance in tail; and although the term was merged, by its union with the immediate freehold in A, yet it was decided that the *possibility of B.* was not defeated, but there was an extinguishment only for the time or estate of A.

In *Moor's* Rep. it is stated that the court agreed that if a term for years be devised to one, and if he die within the term, remainder to another; by *descent* of the inheritance to the first, or by unity of possession, or by his grant, or by his forfeiture, the remainder is defeated. But *Manwood* said, and the whole court accorded, that if land be devised for years, to one, and if he die within the years, that another shall have the residue of the years; no act of the first can prejudice the remainder in the second: but otherwise it is according to *Manwood,* if one who has a term devises his term with such remainder; and the reason of the diversity is said to be, because if he devise the term, this is all one complete estate, by which power is given to the first devisee over the whole term for a certain time; but this is not the case where the land is devised: and for this reason

their opinion was in favor of B. claiming under the devise over of the residue of the years.

It is not easy to comprehend the grounds of the distinction; nor is the first branch of the distinction to be readily adopted, as a correct proposition of law. The interest of B., taken in its true point of view, was a *new term*, devised out of the inheritance. It was to operate, by way of *interesse termini*, rather than by executory bequest. But though a contingent freehold interest, by way of remainder, may be defeated by the merger of the particular estate, by which it is supported; yet no rule of law requires that an interposed executory interest for a term of years, should be defeated by the merger of a prior term of years, or even the merger of a prior estate of freehold. On the contrary, it is considered that a contingent remainder for years will not be defeated by the destruction or merger of the prior particular estate of freehold. (*a*)

The case of *Lee v. Lee*, is also reported in Cro. Eliz. 128. by the name of *Lowe v. Lowe*: and the reason of the decision according to *Croke* was this: although the term was extinct in the second son [A.] yet

(*a*) Corbet v. Stone, Raym. Rep. 140. Fearne 429.

there is a new devise to the third son [B.] for the words are that he shall have such a term. Consequently the case, though it considers these distinctions applicable to executory bequests, is properly to be considered as a decision on a limitation of a new and substantive term of years, by way of contingent remainder, expectant on a prior term of years.

Mr. *Fearne*(*a*) has treated of this subject. According to that acute and accurate observer of the law, where there is an interest devised to one for life, &c. out of a term, and then an executory devise over of the term to another; any subsequent union of the freehold and inheritance with the interest so given to the first devisee; or a feoffment or other act of forfeiture by such first devisee, will not extinguish or destroy the executory devise over; and he illustrates his points by these cases.

As where W. (*b*) possessed of a house for a term of years, devised the profits thereof to J. during the time she should continue sole, and then devised the term to R. and died. J. entered by assent of the executor, and afterwards purchased the fee. It was resolved, that although the whole term was in *J. quousque*, &c.

(*a*) 308. 3d *Edit.*

(*b*) Hamington v. Rudyard, cited 10 Rep. 52.

so that by the purchase of the fee-simple, her interest became extinct, yet the same did not defeat the executory devise to R. but after the marriage of J. and not before, he might enter. And he adds, so in another case, (*a*) it was agreed by the whole court, that if lands be devised for twenty-one years to A. and if he die within the years, that B. shall have the residue of the years; no act of A. can prejudice the remainder in B.

And he further adds: (*b*) where a testator possessed of a term in lands, devised the profits thereof to his wife for eighteen years, and that his son E. should have the lands for his life, and after his death that his eldest issue male should have the profits, &c. after the eighteen years expired; E. entered, and had issue R. and then made a feoffment of the lands; whereupon the reversioner in fee entered for the forfeiture; and upon the question, whether the feoffment and entry for the forfeiture had destroyed the executory devise to R.? It was decreed that they did not.

(*a*) Lee v. Lee, Moor, 269.

(*b*) Cotton v. Heath, Pollexf. 26.

11*thly, Of persons who have estates subject to a condition.*

19*thly, Of persons who have estates to be enlarged on condition; and,*

20*thly, Of persons who have estates to be enlarged,*

First, by confirmation.

Secondly, by release.

The original arrangement has been changed, in order to consider these three heads in one connected point of view.

It will be obvious, that when a condition is annexed to a particular estate, the merger of that estate will, inclusively, extinguish the condition. No one can be prejudiced by such extinguishment; for the merger must be in the next vested remainder or reversion, and consequently must be for the benefit of all persons under more remote estates, who might have claimed the benefit of the condition: and whoever might assert a right to take advantage of the condition, to defeat the estate, will, in effect, have the benefit of the condition through the medium of the merger: since the particular estate will not, after the merger, subsist as against him. This deduction flows from that which has already been assumed to be the law; namely, that a particular tenant has the power of accepting a surrender, which

shall be good as against those in reversion or remainder, as well a against himself, even though it may put an end to a bargain, which is beneficial in respect of rents, &c.

The material points to be considered under this head, are, the effect of merger of one estate in another estate which is afterwards defeated by a condition; and it seems clear, on principle, and it has been so treated in decision, that if a tenant for years accept an estate of freehold, or of inheritance, subject to a condition, and the condition operate to defeat this estate of freehold or of inheritance, the termor shall not be restored to his estate for years; for the estate once extinguished by merger, will not revive at law. Thus in 3d of *Leon*,(a) it is reported that the lessor mortgaged the reversion in fee to the lessee for years, and at the day for the payment of the money, he paid the money, and it was holden, that the lease for years was not revived but utterly extinct. So in *Goldsborough*,(b) it is reported that *Periam* said, that in all cases when the freehold cometh to the term, there the term is extinguished; and therefore if a man mortgage the reversion to the lessee for years,

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(a) Page 92.

(b) 1 Inst. 218. b. The like point as to copyhold tenants, 1 Watk. 356.

and after perform the condition, yet the lease for years is utterly extinguished.

The doctrine advanced by Lord *Coke*(*a*) also is, if a man make a lease for forty years, and the lessor grant the reversion to the lessee upon condition, and after the condition is broken, the term is absolutely surrendered.

And the diversity is when the lessor grant the reversion to the lessee, upon condition; and when the lessee grants or surrenders his estate to the lessor; for a condition annexed to a surrender may revest the particular estate, because the surrender is conditional. But when the lessor grants the reversion to the lessee, upon condition, there the condition is annexed to the reversion, and the surrender absolute.

Although in the two first instances, the term is extinguished at law, yet as it is extinguished by mistake, there is every reason to suppose that a court of equity would decree a similar *term* as against the mortgagor, on the same grounds as courts of equity before the statute of uses; and the statute of uses, as following the decisions of courts of equity, preserved terms of years to those who accepted feoffments or other conveyances to uses; and on the same

(*a*) Page 6.

principle as was proposed by Chief Baron *Hale* in *Attorney General v. Paulet*,(a) and as was argued in *Nelson's* Reports of *Stephens v. Bailly*;(b) where it is in the same terms, or nearly in the same terms supposed, that "a *lord* by escheat would "be subject to an equity of redemption;" (a point much controverted:) "and that "although by the escheat the tenure is extin-"guished, that will be nothing to the purpose; "because the party may be recompensed "for that by the court, by a decree for "rent; or part of the land itself, or some "other satisfaction."

As connected with these points, it may be observed, that if a tenant for years or for life, make a feoffment, he not only commits a forfeiture, but he passes inclusively his term of years or his term for life; and though the reversioner or remainder-man, may take advantage of the forfeiture, yet it is apprehended he may even contend that the term for years or term for life, is subsisting, so as to give him a right to the benefit of any rent or service to which the term for years or term for life was subject.

In *Mounson* v. *West*,(c) *John Moun-*

(a) Hardr. 469.
(b) 107.
(c) Golds. 92.

son had an estate for years, the remainder in tail to P., with divers remainders over, and the lessee made a feoffment to divers; and a letter of attorney to others, with commission to enter into the lands, and to seal the feoffment, and deliver it in his name to the use of *Thomas* and his heirs; and another by commission or letter of attorney of *Thomas* entered in his name; and the court held this a good feoffment, notwithstanding both the lessee and the attorney were disseisors: for it is good between the feoffor and the feoffee; for they said that by the feoffment to the use of the remainder-man, and his heirs, if he in remainder enter he is remitted; [this is a doubtful point]; but the material point is added in these terms, "and the estate "for years is gone implicatively." Nor is the doctrine from the *Year Books* collected in *Viner's* Abridgment,(*a*) or in Dyer 127 to the contrary. In the former book, it is said, lessee for life makes a feoffment on condition, and enters for breach; he shall be lessee for life, and reduce the reversion to the lessor. Lord *Coke* (*b*) has the same point, and that he shall be tenant for life again, and subject to a *forfeiture;* for the

(*a*) Condition, P. a.
(*b*) Page 202. b.

estate is reduced, but the forfeiture is not purged. (*a*)

In another point it is said (and this point is against the doctrine in *Mounson v. West*) if lessee for life enfeoff the reversioner on condition, and enter for breach thereof, he shall be lessee again, and the rent due to the lessor shall be revived.

According to many cases this intended feoffment is, in construction of law, a surrender, subject to a condition and not a feoffment. (*b*)

Some of the cases of this class depend on the ground that the tenant for life did not pass his estate for life, but he passed a new fee gained by wrong; others depend on the ground that there was a *surrender*, and that the surrender was subject to a condition, and not absolute.

It is true the lessee gave a title to the feoffee as against his estate for life; but when the condition operated, and the lessee for life entered by virtue of the condition, he was in the same plight, and had the same estate, as when he made the feoffment; for his re-entry by virtue of the condition was not a new disseisin, nor was it a continuance of the former disseisin: but the

(*a*) 1 Inst. 252.
(*b*) Perk. § 620. 1 Inst. 252.

law, which prefers an estate by right to an estate by wrong, will treat him as in possession under his former seisin and under his former title. On a similar principle it is decided, that if a tenant in tail make a *discontinuance*, by creating an estate for life, or an estate-tail, the discontinuance, unless enlarged, will cease, and the old estate-tail will revive, when the estate for life or the estate-tail, depending on the discontinuance shall cease. It remains to add another point: lessee for life and the reversioner join in a feoffment, and a condition is reserved to the lessee; if he enter for breach thereof, this shall not defeat the entire estate.(a)

This proposition owes its origin to the same rules of law, as prevailed in *Bredon's* case, and *Treport's* case. Though the estate for life and the fee were united, yet the title was held under the *two distinct* estates; and the estate for life, though blended with the fee, was not merged. For this reason the tenant for life, might well enter, in respect of his estate for life, leaving to the feoffee, the inheritance under the grant of the reversion; but if a person were to grant the fee to one; or apportion it out to one for life, with remainder to another in fee, he could not by any con-

(a) Dyer, 127. b. pl. 55.

dition defeat the estate partially. He cannot resume the possession either for life, or bring back the estate for life without the fee, or the fee without the estate for life: except indeed he should grant the estate for life, in the first instance, and afterwards grant the fee, as a reversion, by a different feudal contract.

In this respect there is a great difference between the rules of the common law, and the rules which are established under the learning of uses, and the learning of executory devises; for through the medium of *powers*, *executory devises*, *springing* and *shifting uses*, estates may be partially defeated or over-reached, as is fully illustrated by the doctrine to be found in *Mary Portington's case*, (*a*) and as occurs in the practice of every day with reference to jointuring and leasing powers, and the like.

The points in Coke Litt. 218 b. may be read in this place, for the purpose of keeping within reach the distinctions applicable to this learning; and they are also important as authorities for many of the propositions already advanced.

Estates to be enlarged on condition, are of a peculiar nature. They are attended with

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(*a*) 10 Rep. 376.

many distinctions which deserve attention. The subject is discussed by Litt. § 350, and by *Coke*, in his commentary on that section ;(*a*) and a few observations on the subject are added in the Essay on Estates, Chap. Freehold. The material point is, that there are *not at any one time two estates :* so that one may merge in another. There is *one entire* contract, under which, a person may have a fee to day, (*b*) to be changed into a term of years to-morrow ; or he may have a term of years to day, to be enlarged into a fee at some future period, or on an event : so that this species of estate, is as well an estate which may be diminished, as an estate which may be enlarged, on a condition ; and by the word condition *contingency* must be understood.

Indeed, it may be added as highly probable, that there may be an estate, to be a term of years on one event, to be changed into a fee on another event ; and to be reduced into an estate for life, or in tail, on a third event.

It is to be observed, there is one *entire conveyance.* There are not several conveyances, though there are several grants. For this reason, and because two estates

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(*a*) 1 Inst. 216. b.
(*b*) Litt. § 350. 1 Inst. 218. b.

are not existing at one and the same time, the doctrine of merger is inapplicable.

Estates to be enlarged *by release or confirmation* were fully examined in the second volume of this work.

In these instances there must be an estate, before there can be an enlargement. The enlargement is produced, by the addition of the remainder or reversion to the particular estate.

The particular estate will in some instances at least be united with the reversion or remainder, and they will form one entire estate. Will this union produce the effect and consequences of merger? Or will the particular estate continue in point of estate as part of the enlarged estate, so as to give a right to the rents, conditions, &c. annexed to the particular estate, and so as not to accelerate charges and incumbrances affecting the reversion or remainder? This is the point for inquiry.

And the case cited from *Moor*,(a) and the case of *Webb v. Russell*,(b) have severally decided that there shall be a merger; and that the consequences of merger shall be induced; and yet no such consequence would follow from a conveyance in which these several

(a) Page 94.
(b) 3 Term Rep. 403.

persons should unite to transfer their several estates, as one entire interest, in a third, or distinct person.(*a*) On the enlargement of estates as between husband and wife, a few observations will be added under the appropriate head.

12*thly*, *Of Persons who are Releasees to Uses.*

This subject has been amply discussed in page 364, &c. In this place it will be necessary only to remind the reader, that no estate will be merged, by reason that the owner thereof accepts another estate merely as a releasee or grantee to uses. On the other hand, an estate which such feoffee, releasee, or grantee may take under an use declared of his estate, may be the cause of merger; in the same manner, and under the same circumstances, as if the person taking an estate under the use had not been the feoffee, the releasee, or the grantee to uses. It is also to be remembered that this protection is extended to a person who is an instrument towards the raising of uses, although he be not the feoffee, the releasee, or the grantee on whose immediate seisin the uses arise. Thus in the instance of a conveyance to a man, and his heirs, to the

(*a*) This point will be further examined as to *copyholders*.

intent that he may be tenant of the free-hold,(*a*) to the end that a common recovery may be suffered to uses, although the uses arise from the seisin of the demandant, and not from the seisin of the tenant; yet the estate which was in the tenant prior to the acceptance of the conveyance, will be protected. So an use may result to a tenant for life who surrenders, for the purpose that a recovery may be suffered, when the sole object of the surrender is, that the recovery may be suffered; and when no express uses are declared, to exclude uses by implication.

As connected with this subject, and as a point equally common to the learning of uses, and to the learning of wills, it may be observed, that an estate will never be raised, by implication under a conveyance to uses, (and the same rule is equally relevant to wills,) when a consequence of the implication would be, to merge an estate of a different quality or quantity, (*b*) limited to the person in whose favor an use would otherwise be implied.

In *Goodright v. Cornish,* (*c*) a devise was to *John* for fifty years, if he should so long live, and as to the inheritance after the said

(*a*) Ferrers and Curson v. Fermor, Cro. Jac. s. 613.
(*b*) Dyer, 111. b. Note.
(*c*) Salk. 226.

term, to the *heirs male of* the body of *John*, and for default of such issue then to *Richard;* and the court resolved that *John* had not an estate-tail by implication of the words "without issue;" because the devisor had given him an estate for years, by express words, and the court could not make such a construction against express words, when thereby they would also drown the estate for years and make an estate of inheritance. The ground of this case is, that an estate for life could not be implied in the testator's heir, so as to connect itself with the limitation to the heirs of the body, under the rule in *Shelley's* case. Also in *Adams v. Savage,*(a) *Rawley v. Holland,*(b) the settler was excluded from an estate for his life by implication; because an express estate was limited to him for a term of years. In the former case, the court said, an estate should not be implied, contrary to the intention of the conveyance; and in the latter case that no estate of freehold could result to A. for his life by implication, because another estate, viz. for ninty-nine years, if he should so long live, was expressly limited to him, and was inconsistent with the freehold by implication.

Still less can an estate result when there is a limitation to some other person for the

(a) 2 Salk. 679. 2 Lord Raym. 854.
(b) 5 Vin. Abr. 22.

life of the settler; as is evident from the cases of *Tippin v. Cosin,* (a) and *Else v. Osborne.*(b)

So the fee shall not result to the feoffor if the resulting use would cause the immediate merger of an estate, limited to him expressly for years.(c)

Thus the rule must be understood with the qualification, that the implication of an estate for life, will be withheld only when the implication would be contrary to an express estate; or the consequence of the implication would be an *immediate* merger of an estate expressly limited. But when several estates are limited, an estate for life may be implied, if it can be done consistently with the other limitations; and although after the determination of mesne estates there may be a merger of the prior estate by reason of the estate to be raised by implication, the implication will be excluded.

Every case of this sort must depend on its own circumstances, since a limitation to the settler in one case, (*Adams v. Savage,*) for ninety-nine years, and in the other case (*Else v. Osborne,*) for ninety-nine years, determinable on his death, excluded the implication, though there were mesne

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(a) 4 Mod. 380.
(b) 1 P. Wms. 387.
(c) Dyer, 111. 6. Note.

estates; while in *Penhay v. Hurrell*, (a) an estate for life was implied after a term of three thousand years, although there was a prior estate to a trustee, for a term of years determinable on the death of the settler; on the other hand, in *Rowley v. Holland*, where the circumstances were the same, except that the *settler* himself, was substituted in the place of the trustee, as to the term of ninety-nine years determinable on his death, the implication was excluded.

13thly, *Of Persons who have Estates-Tail.*

On this subject there is an ample discussion in p. 342. The general result is that an estate-tail, while vested in the donee or heir in tail, *under the intail*, will, for the sake of the heirs in-tail, and to preserve their right of succession, be protected from merger; but this estate when changed into a *base fee*, either in the donee in tail, or in any other person, will, like all other particular estates, be subject to the doctrine, and to the operation of merger.

Though it is agreed that an estate-tail is privileged from merger, yet it seems the

(a) 2 Vern. 370.

privilege is only in favor of the issue, to preserve their interests.(*a*) To carry the exemption farther, would be attended with absurdities. What reason can be adduced against the merger of the determinable fee, arising from a conveyance by tenant in tail, in the reversion in fee, subject to a right in the issue to defeat the determinable fee? By allowing them to restore themselves to the estate-tail, their rights are amply protected. On the other hand, by denying that the determinable fee was capable of merging, might be to carry on two successions, till the right of the issue was clearly barred and defeated; and then the determinable fee, if the union continued, must merge, so that the right of succession, under a continuing seisin might be varied, without any new act of the party. It is more reasonable, and more consistent with the rules of law, to say, (and this indeed is the effect of the decisions,) (*b*) that as against the issue in tail, the right to the estate-tail is subsisting,(*c*) and against all other persons the time of the estate-tail is merged.

To the authorities which have been cited may be added *Crow v. Baldwere*, (*d*) for the

(*a*) Perk. s. 520. cites H. 7. 11.

(*b*) Stringer v. New, 9 Mod. 363.

(*c*) Symonds v. Cudmore, 4 Mod. 1.

(*d*) 5 Term Rep. 104.

purpose of introducing the observation of Lord *Kenyon*, which was made in these terms:(a)

"The operation of a fine and a re-
"covery on questions of this kind is ex-
"tremely different. If a tenant in tail,
"with a reversion in fee to himself, levy a
"fine, the effect of that on the estate-tail is
"creating a base fee; and that becomes
"merged in the other fee, and lets in all
"the incumbrances of the ancestor, which
"has frequently happened in practice, from
"such a person being ill advised to levy a
"fine, instead of suffering a recovery.
"Generally speaking, where two estates
"unite in the same person in the same
"right, the smaller one is merged in the
"other, except in the case of *an estate-tail*,
"and a reversion in fee, which may exist
"together. In such a case, by the ope-
"ration of the statute *De donis* the estate-
"tail is kept alive, not merged by the
"reversion in fee."

In addition to the authorities already cited, it may be observed that a remainder in tail may be void, because the same extent of ownership or more is, in effect, comprised in a former estate-tail. This may be the result, though there are different

(a) Crow v. Baldwere, 5 Term Rep. 109.

states of ownership; as in the instance of a gift to a man and woman, and the heirs of the body of the man, with remainder to the man and woman and the heirs of their *two* bodies:(*a*) for the second estate-tail must necessarily expire with the determination of the *former* estate-tail.

14*thly*, *Of Persons who have Estates in Right of their Wives and also of themselves.*

A general view of the law on this subject has been taken in p. 278, and in different parts of this Essay. All that remains to be done in this place, is to take a summary view of the distinctions applicable to this subject,

1st, With reference to terms of years.

2dly, With reference to estates of freehold.

And 3dly, With reference to estates to be enlarged by release or confirmation.

1st, When a woman has a term of years(*b*) either in her own right, or as executrix or administratrix, and her husband afterwards purchases the immediate reversion or remainder, the term will be merged; but if the reversion had *descended* to him, or if he had purchased the reversion or remainder before his wife acquired the term, the act of

(*a*) 1 Inst. 28. b.

(*b*) Downing v. Seymour, Cro. Eliz. 912.

law would not have been an extinguishment of the term of the wife.(*a*)

In Easter Term, 5 Eliz.(*b*) it was held by all the justices that if a feme executrix has a term and takes a husband, and the husband purchases the reversion, the term is extinct as to the wife if she survive—but in respect of all strangers, it shall be accounted assets in *ses mains.* In another case, *Holt*, Chief Just. indeed said,(*c*) "so if A. "has a term in right of his wife, or as exe-"cutor, and *purchases* the reversion, it is no "extinguishment, because he has the term "and reversion in different rights."

The case of Lady *Platt v. Sleap*,(*d*) is an authority that the descent of the immediate freehold to a feme does not merge an estate for years vested in the husband in his own right.

In another case, (*e*) a lease was made to husband and wife for years, and they entered; the lessor afterwards enfeoffed the husband, who died seised. The wife survived and claimed the term; and betwixt the wife and the heir of the husband, the debate was, whether this term was extinguished: and it was held by the whole

(*a*) Leon, 38.
(*b*) Moor, 54.
(*c*) 1 Salk. 326.
(*d*) Cro. J. 275.
(*e*) Downing v. Seymour, Cro. Eliz. 912. see also Moor, 54. 4 Lev. 38.

court, that by the acceptance of the feoffment, the husband had surrendered the term, and it was extinguished.

A distinction is added in these terms. "But if the conveyance had been by bar-"gain and sale inrolled, or by *fine*, it had "been otherwise." Neither the reason or the grounds of this distinction are comprehended.

But if an estate for years (*a*) be granted to A. and the wife of the reversioner, it shall not drown in the reversion, but upon the death of the wife previous to A. the intirety shall vest in him. The exemption from merger is, first, for the sake of the other joint-tenant, and secondly, and principally, because the husband had the inheritance before his wife acquired the term; for if she and her companion had been joint-tenants of the term, and he had purchased the reversion, there would have been a merger for a moiety: so if she should survive, the term would continue in her and her husband in her right; of course the interest of the joint-tenant is not the only ground of exemption.

2dly, When a woman has an estate of freehold for her life, with remainder to her husband for life, her estate of freehold will remain distinct from the estate of her husband, and will not merge in it.(*b*)

(*a*) Plow. Com. 418.

(*b*) Stevens v. Bretridge, 1 Lev. 36

Also though her husband had purchased the remainder or reversion, her estate would not have been destroyed as against her; still less would it have been destroyed by a descent to him of the remainder or reversion.

So when the husband has an estate for life, and the fee descends to his wife, his estate for life will remain; but when the husband has an estate for years or for life, (*a*) and he and his wife, or his wife with his consent and agreement (for she cannot become a purchaser against his will) purchase the remainder or reversion expectant on this particular estate, then it should seem, the particular estate of the husband, will merge. And where husband and wife are seised in right of the wife for her life, and they accept a grant of the reversion, the estate for life will be merged; at least, till the wife waives the reversion; and by this merger a contingent remainder will be destroyed.(*b*)

A woman tenant for life intermarried with him in remainder in tail, and husband and wife joined in a fine: there was not any *discontinuance*. (*c*) This proves that there is not any merger of the estate, *to all intents*;

(*a*) Jenk 73.

(*b*) Plunket v. Holmes, supra.

(*c*) Stevens v. Bretridge, 1 Lev. 36.

for if the estate was merged *to all intents*, the husband would be tenant in tail in possession, and his fine would create a discontinuance

3dly, In reference to estates to be enlarged by release or confirmation; the estate of the wife confers a seisin on the husband and wife in right of the wife; and therefore allows of an enlargement to him; but when the husband has an estate in his own right, the wife has not in respect thereof any seisin, admitting of an enlargement to her. Hence the distinction to be found in Litt. (*a*) and in Co. Litt. (*b*) The language of Litt. in section 525. is, "Also if I let certain "land to a feme sole, for term of her life, "who taketh husband, and after I confirm "the estate of the husband and wife, to "have and to hold for term of their two "lives. In this case the husband doth "not hold jointly with his wife, but hold-"eth in right of his wife for term of her "life. But this confirmation shall enure "to the husband by way of remainder, for "term of his life, if he surviveth his wife." And in section 226 the language is, "but "if I let land to a feme sole for years, "who taketh husband, and after I confirm

(*a*) s. 525, 526.
(*b*) 299. a. b.

"the estate of the husband and his wife, "to have and to hold for a term of their "two lives: in this case they have a joint "estate in the freehold of the land, for that "the wife had no freehold before, &c."

On the 525th section of *Littleton* Lord *Coke* has the following observations:

First, "The baron has such an estate in the "land in right of his wife, as he is capable of "a confirmation, to enlarge his estate; and "therefore if the confirmation had been "made of his estate to him alone, to have "and to hold the land to him and to his "heirs, this had been good to have conveyed "the fee-simple to him, after the decease of "his wife; for if in this case a release be "made to the husband and his heirs, this "is sufficient to convey the inheritance of "the land to the husband."

Secondly, "The wife hath the whole for "her life."

Thirdly, "If the confirmation had been "made to the husband and wife, to have "and to hold the land to them two and their "heirs, they had been joint-tenants [read "tenants by intireties] of the fee-simple, "and the husband seised in right of the "wife for her life; for the husband and the "wife cannot take by moieties [add without "words of express severance] during the "coverture."

Fourthly, he adds these distinctions,

"If a man letteth land to the husband "and wife, to have and to hold the one moiety to the husband for the term of "his life, and the other moiety to the "wife for her life, and the lessor con- "firm the estate of them both in the land, "to have and to hold to them and their "heirs: by this confirmation, as to the "moiety of the husband, it cometh only "to the husband and his heirs; for the "wife hath nothing in that moiety; but as "to the moiety of the wife they are joint- "tenants, as hath been said, for the husband "hath such an estate in his wife's moiety in "her right, as is capable of a confirmation. "But if such a lease for life be made to "two men, by several moieties, and the "lessor confirms their estates in the land, "to have and to hold to them and their "heirs, they are tenants in common of the "inheritance; for regularly the confirma- "tion shall enure according to the quality "and nature of the estate, which it doth "enlarge and increase."

And on the 526th section, Lord *Coke* observes,

1st. "Chattels reals, as leases for years, "wardships and the like, are not given to "the husband absolutely (as all chattels "personals are) by the intermarriage, but "conditionally, if the husband happen to "survive her, and he hath power to alien

" them at his pleasure, but in the mean
" time the husband is possessed of the chat-
" tels real in her right."

2dly, " That the husband hath such a
" possession in her right of the chattel as
" is capable of the confirmation or of a
" release."

3dly, " The confirmation in this case to
" the husband and wife for their lives maketh
" them joint-tenants for life, because a
" chattel of a feme covert may be drowned:"
and so note a diversity between a lease for life, and a lease for years made to a feme covert; for her estate of freehold cannot be altered by the confirmation made to her husband and her, as the term for years may, whereof her husband may make disposition at his pleasure.

The following difference is also to be observed—If a sole woman seised of land in fee lease the same unto a stranger for life, and taketh a husband, and the lessee doth grant his estate unto the husband, this is no surrender: and yet as *Perkins*(a) observes, the husband is seised of the reversion in fee, which is immediate unto the estate of the lessee: viz. in the right of his wife, and not in his own right. *Sheppard* in his Touch-

(a) Sec. 62?. Shep. Touch. 82. S. P.

stone(*a*) has mistaken this point. He assumes that the husband is not capable of a surrender, while the true ground of the case is, that he has taken a *grant* and not a *surrender*.

In *Brooke*, Ch. Surrender(*b*) these points are also to be found: land was given to R. and J. his wife, and to the heirs of R., and R. died having issue a daughter *Cicily*, who took for her husband O.; and afterwards J. who had survived, gave(*c*) the land to *Cicily* and O. her husband in tail,(*d*) the remainder in fee to O. It is added, *query* if this be a surrender? And it seems not; because the husband is joined with his wife. And he adds,(*d*) also *note* by all the justices of the Common Pleas, if a man lease land to two for the term of their lives, and has issue two daughters and die, and one daughter takes husband, and the tenant *grant* his estate to the husband and wife, that this is no surrender clearly. *Perkins* (*e*) states the same point to the same effect.

These cases prove that a purchase by way of *grant*, which a husband makes in his own right, either to himself alone, or to himself and wife jointly, will not operate against the *intention*, as a *surrender*.

(*a*) page 304.
(*b*) pl. 20.
(*c*) By feoffment—must be understood.
(*d*) pl. 23. Shep. Touch. 82. S. P.
(*e*) Sect. 623.

On the other hand, an instrument in the form of an express surrender, would produce the effect of the instrument whose form was adopted.

In another case(*a*) there was a tenant by the curtesy, with the reversion to husband and wife. The tenant by the curtesy enfeoffed the husband and wife, and this was adjudged a *surrender* to the wife, and no feoffment; and so, adds *Brooke*, see that if the feme die without issue, the heir of the wife may enter upon the husband: and the like point is in pl. 34. The reason of the determination seems to have been, that the feme was an infant. Another, and more cogent, reason may be, that a *surrender* would be a *rightful* act, while a feoffment, operating as such, would give a fee under a new title, and by *wrong*.

A husband and wife(*b*) joined in a fine, for the purpose of giving effect to a building lease of lands, in which the wife had an estate for her jointure, for her life; and it was held, that the wife's estate should not be subject to the charges of the husband, created between the jointure and the lease. This case proves that no merger of the wife's estate took place, but the use arose to each person from his or her own seisin or estate.

(*a*) Brooke Surrender, pl. 26.
(*b*) Skin. 258. Com. Dig. Uses D. 3.

15thly, Of Persons who have Estates as Executors or Administrators, and also in their own Right.

An ample discussion on this subject will be found in p. 299.

The prominent distinctions are—first, the law, unless forced to a different conclusion, favors the continuance of the estate which the executor or administrator has in that character. And therefore the act of law will not, by its own operation, without the intervention or act of the party, put an end to the estate of the executor or administrator. Hence the decisions which establish that when the owner of the immediate freehold, or of the inheritance, becomes an executor or administrator; or when a person being an executor or administrator takes the fee by descent, or marries(*a*) the owner of the reversion or remainder; in either case, there will not be any merger; because the descent or title by marriage; or the character of executor or administrator, is by mere operation of law; but the moment the executor or administrator ceases to hold the term in that right by claiming the term as legatee, &c.; or the moment that he or a husband by his own voluntary act purchases the rever-

(*a*) 4 Leo. 38.

sion or remainder expectant on the term of years, the term will be influenced by the learning, and consequently be subject to the operation, of merger.

In these distinctions will be found a summary, and the general result of the detailed view which has been taken, of the several decisions, and text authorities, relevant to this point.

16thly, *Of those who have several Estates, one in their individual Capacity, another in their corporate Capacity.*

No point in the law of merger seems to be involved in more difficulty than that, which belongs to this head. It is not easy to extract any satisfactory principle, or solution from the authorities. The reader is referred to the observations which have already been offered; and the distinctions which are stated by *Comyns* in his Digest(*a*) will be added.—He puts the distinctions in these terms. So if a natural person purchases to him and his successors, he has only for life; so if a body politic takes in its natural capacity, as a lease to a dean, &c. for one hundred years, and afterwards a release to him and his successors, it gives to him only for life, for he

(*a*) Title Estates, a. 2.

takes the lease in his own natural capacity. So if a corporation sole, as a bishop, parson,(*a*) &c. purchases, he has not a fee without the word successors.

On these distinctions it may be observed, first, that the purchase is assumed to be by *deed* and not by will; and in a deed, the word successors is not, though in a will it is, equivalent to heirs. In the second instance, the purchase was in the corporate capacity. And in reference to a corporation the word heirs in a *deed* is not equivalent to the word successors.

In the third instance it is submitted though a dean and chapter may have a lease for years in their corporate capacity, yet a sole corporation, as a chantry priest,(*b*) a parson, or even a dean, being a sole corporation cannot have a term in any other than its individual capacity. The point, however, intended to be expressed is, that when the dean has a term of years in his individual capacity, and the release operates to the dean in his individual capacity, the fee cannot pass to him without the word "heirs;" for in a deed the word "successors" will not be equivalent to the word "heirs." In those instances in which the dean is a sole corporation, it

(*a*) Add, Chantry priest incorporable, 1 Inst. 9 a.
(*b*) 1 Inst. 9. a

would, in reference to those instances, be proper that the grant should be to the dean and his successors when he is to take in his corporate capacity. And yet Lord *Coke* has supposed that a chantry priest incorporate, is not capable of a grant to him and his successors; a point which is questionable: for a bishop or a parson is capable of a fee as such; and a grant to a bishop in *libera eleemosina* will pass the fee without any words of inheritance.(*a*)

Had the law been otherwise, the general result would have seemed to be that a release to a sole corporation in its politic capacity, would not enlarge or merge the estate which the individual had in his own right, and in his individual capacity; but the case of the lessee becoming parson, as generally understood, favors a contrary conclusion. For a release to the individual who is a sole corporation, and to his heirs, will enlarge a term vested in that person, because he cannot have the term in any other right than in his individual capacity. But when a term is vested, as it may be, in a corporation aggregate of many, the grant of the fee to any *individual*, being a *member* of that corporation; or even to the *head* of that corporation, as a mayor,

(*a*) 1 Inst. 9. a.

dean, &c. will not extinguish the term. The case of the lessee, who afterwards becomes parson of the lands which are leased, and on which so great a diversity of opinion has been entertained, occasions the principal difficulty; since an individual took the term as an individual, though granted to him when parson, and the term was treated as extinguished, and not merely as suspended by his acceptance of the parsonage in his character of parson: so that though in his politic capacity he became the owner of the freehold, the term which he had in his individual capacity was annihilated.

Lord *Coke* accounts for the distinction in these terms:(*a*) "A master of an hos-"pital being a sole corporation, by the "consent of his brethren, makes a lease "for years of part of the possessions of "the hospital. Afterwards the lessee for "years is made master. The term is "drowned. For a man cannot have a "term for years in his own right and a "freehold in *autre droit* to consist toge-"ther, (as if a man, lessee for years, take "a feme lessor to wife) [an example, how-"ever, which in the mode in which it is "stated, is not law.] But a man may

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(a) 1 Inst. 338. b.

"have a freehold in his own right, and a
"term in *autre droit*; and therefore, if a
"man lessor take a feme lessee to wife,
"the term is not drowned, but he is pos-
"sessed of the term in her right, during the
"coverture. So if the lessee make the lessor
"his executor, the term is not drowned.

"But if it had been a corporation
"aggregate of many, the making of the
"lessee master, had not extinguished the
"term; no more than if the lessee had
"been made one of the brethren of the
"hospital."

17thly, Of Persons who have Titles by Curtesy.

18thly, Of Persons who have Titles to Dower.

In order to confer a title of *dower*, or a title by *curtesy*, two out of many other requisites must concur.

First, As to dower, the husband, and as to curtesy the wife must have a *sole seisin*, and such seisin should be *of the freehold and of the inheritance*; either as one entire estate, or as several estates, without any interposed estate of freehold. The impediment arising from a *joint-tenancy*, may be removed by means of merger, operating to sever the tenancy; as in *Wiscot's case*, and other like instances. So the im-

pediment arising by an interposed estate of freehold, as in *Duncombe v. Duncombe*, may be removed by the merger, first of the interposed estate of freehold in the inheritance, and secondly, of the immediate estate of freehold in the same inheritance; thus uniting the freehold and the inheritance; and thus conferring a seisin of which the husband may have curtesy, or a wife may have dower. Several instances of this sort have been given in preceding parts of this work.

It is also to be remembered that a man may have a seisin of which his wife may be dowable, or a woman may have a seisin giving a title of curtesy to her husband, by reason of a temporary union of the freehold and of the inheritance. Such title to dower, or to curtesy, may be defeated by reason that a *contingent remainder* interposed between the freehold and the inheritance becomes vested, and separates the freehold from the inheritance. The two leading authorities on this point are the cited cases of *Lewis Bowles*, (*a*) and *Boothby v. Vernon*, (*b*) and the other cases of that class collected under the head treating of Contingent Remainders.

(*a*) 11 Rep. 79.
(*b*) 9 Mod. 147.

It should be remembered in this place, that the existence of an interposed estate for years, does not exclude the right to dower or to curtesy; and that *terms for years* are frequently kept on foot to *attend the inheritance*, for the purpose of protecting the inheritance from a title of dower, attaching after the creation of the term. Should the term become merged by accident or design, this protection would be lost. And it is to be observed, that neither the heir or the devisee of the husband can use a term as a protection, against the dower of the widow; nor can a purchaser, after the death of the husband, avail himself of the term, to the prejudice of the dower of the widow, unless he has obtained an actual assignment of the term; and it should seem that such assignment should be taken in the *life-time* of the husband,(*a*) and consequently before the right to dower shall be perfected in the wife, by the death of her husband. To render the term available against the wife, (*b*) a *cesset executio* during the term is to be obtained as part of the judgment: such cesser of execution cannot, it is apprehended, be obtained when a *rent* is re-

(*a*) Maundrell v. Maundrell, 10 Ve . J. 246.
(*b*) Salk.

served by the lease creating the term, and the wife is intitled to be endowed of the reversion, and consequently of the benefit of the rent, incident to that reversion. And as every term originating by way of lease, and not as a particular estate with remainder over, creates the relation of lord and tenant, and consequently a right *to services*, which under the feudal system was the principal object of tenure, it is rather singular how the *cesset executio* was introduced into practice. Its introduction may, perhaps, be accounted for in this manner. It is a cesser of execution only as to the *possession*, and not as to the benefit conferred by the reversion in respect of rent or services. It restrains the right to have the actual occupation of the land, and not the pernancy of the rents, &c. Thus the wife *obtains* an actual estate of freehold by way of reversion, and a right to the rent or services as annexed to the reversion, although her right to the actual possession is suspended or postponed. Partly on these grounds, and partly because the term may, by the accident of merger, &c. become extinguished, the practice with many conveyancers, contrary to the general and prevailing opinion in former times, is to advise purchasers not to rely on an *attendant term*, as a clear and certain protection against dower; but they are recommended to require a fine to

be levied by the husband and wife, in extinguishment of her title of dower.(*a*)

21stly, Of Persons who are Copyholders.

In reference to this subject the reader must carefully distinguish between merger and extinguishment.

There may be a merger of a particular estate in the remainder or reversion in fee, when both estates are of copyhold tenure.(*b*) This is properly an instance of merger; and *Dove v. Williot* is an authority that merger may take place between those parties: for it was said by *Gawdey*, *Clench*, and *Wray*, that "by the surrender of a tenant for life "to the use of him in remainder, his estate "[the estate for life] is drowned in the fee, "and as it were extinct." In that case there was a tenant for life with remainder in fee, and the remainder-man made a *lease*, and afterwards the tenant for life and the remainder-man joined in a surrender to the use of the remainder-man in fee. And it was held that the lease for years became immediately chargeable on the possession, and the point was illustrated by a comparison in the terms, "as if he in the remainder

(*a*) The 19th and 20th heads of division, are introduced after the 11th division.

(*b*) Cro. Eliz. 160.

"grants a rent-charge, and after the tenant "for life surrenders, the rent shall com-"mence presently." To avoid confusion or erroneous conclusions it will be proper to distinguish this case from *Treport's* case, *Bredon's* case, and the cases of that class. A surrender of copyhold lands to uses is a common law assurance. The use is a limitation of a legal estate, and although the tenant for life and the remainder-man joined in the surrender, yet, in construction of law and in effect, the surrender proceeded entirely from the tenant for life, and consequently there was not a conveyance in fee, proceeding from the united ownership of the tenant for life and of the remainder man; but merely a surrender by the tenant for life of his estate for life, to the use of the remainder-man. The surrender by the remainder-man to the use of himself was inoperative.

On the head of extinguishment of the copyhold tenure, the reader is advised to consult the chapter in which Mr. *Watkins* has treated of that subject. The result of the rule that *nemo potest esse dominus et tenens*, is, that whenever the copyhold tenant acquires an estate either in possession or reversion or remainder in the freehold tenure of the same lands, he will cease to be a tenant by copy of court roll; and even an *estate-tail* will be barred. Although a copyholder has,

for the purposes of enjoyment, a fee or an estate-tail, or an estate for life, yet, in intendment of law, he is merely tenant at the will of the lord; and consequently his fee, his estate-tail, or his life-estate, may be extinguished by his acceptance of any estate, however small, in the freehold tenure. In this respect there is a difference between copyhold interests and all other interests. The decisions are founded on the principle that the copyholder is merely a *tenant at will*. Therefore the general rules which govern the learning of merger, or the nice distinctions which prevail in the general learning of suspension and extinguishment, cannot with propriety be brought into application in a question which involves the extinguishment of the copyhold tenure in the freehold tenure. As to copyholds, there is rather a change or extinguishment of tenure than a merger of estate.

These are all the observations which it is either necessary or fit to make on a subject, so fully and amply discussed, in a work which is in the hands of most professional gentlemen.

The doctrine of *enfranchisement* of copyhold lands, does to a certain extent partake partly of the learning of merger, and partly of the common law learning of extinguishment. As a point of practice, it may

be strongly recommended that every copyholder prior to his acceptance of an estate in the freehold tenure, either by way of extinguishment or enfranchisement, should create a *term for years*, out of the copyhold tenure, with the consent of the person who has the freehold tenure, and obtain a declaration of trust under which this term of years may be kept on foot, to protect the title from incumbrances affecting the freehold tenure, as far as these incumbrances would attach on the possession in derogation of the title under the copyhold tenure, if the title under the copyhold tenure were accepted, without the precaution of creating a term for years out of that tenure. It is believed, there is a case, (though that case has not been found,) in which it was decided that the incumbrances affecting the freehold tenure, were not accelerated by an enfranchisement to the tenant under the copyhold tenure. If such a case should be found, and it should be considered as law, the ground of decision must be that an enfranchisement operates by way of enlargement of the estate of the copyhold tenant; so that the possession is held under the copyhold title, and consequently there is not any absolute merger of the copyhold estate, so as to accelerate the charges of the lord of the manor or other person,

having the estate under the freehold tenure Such a proposition, though it may have been perfectly consistent with the principles of tenure, did not prevail in those cases of enlargement of estates for years, &c. by release and confirmation, in which the general principles, if there be such a principle of law applicable to the enlargement of the estate of a copyholder by enfranchisement, might have prevailed with reference to the enlargement of an estate for years, &c. It is in vain to say that the case of a copyholder in fee, accepting an enfranchisement, and the case of a tenant in fee of the freehold tenure, who accepts a release of the services, stand on the same footing. In the case of the copyholder the estate of the freeholder passes by way of conveyance from him to the copyholder. This estate is extinguished, and with it the right of common, &c. There is the enlargement of an *estate at will* into an estate in fee. This is a case within the statute of *quia emptores*;(a) but in the case of a release of services, to a person who has an estate in fee of the freehold tenure, there is merely an extinguishment of the services. The lord has no estate in the land, but merely an estate in the

(a) 21 Ed. I.

seignory and in the services; and hence the distinction, that when the tenant purchases the manor, the tenancy is extinguished in the manor; while the services are extinguished in the land when the tenant of the land accepts a release of the services.

The authorities collected to illustrate the leading propositions under this division are stated in the margin. (*a*)

22dly, As to Persons who claim by Descent.

By means of merger, as applicable to *estates*, and by means of extinguishment as applicable *to tenure*, to *services*, and to *equities*, &c. the course of descent may be varied.

1st, As to estates. A *possessio fratris* may be acquired so as to make the sister heir by the union, and *consequent merger*, of the freehold with the inheritance. Also a man may have several estates descendible in a different manner; and by reason of merger, the course of descent may be changed as to all these estates, except that

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(*a*) 6 Mod. 67. 3 Peere Wms. 9. Andrews, 91. Vin. Abr. Merger, 361. 363, 364. Vern 458. 393. Cro. Eliz. 160. 360. Carter, 23. Com. Dig. Copyhold, P. E. F. 6. 2 Rep. 17. 2 Vern. 243. 2 Ves. J. 524

in which the merger shall take place; for example, a person may have an estate for a life or for several lives, and that estate may be descendible or rather transmissible, to the heirs of the first purchaser of that estate, and his mother or some other ancestor, may have been the first purchaser: he may at the same time have an estate-tail, of which he himself or some ancestor may have been the donee, and he may at the same time have the reversion or remainder in fee, descendible in a particular manner. The last estate may have been of his own purchase, and consequently be descendible to all his heirs, without any exception or exclusion, beginning with his paternal heirs.

The estate for life, or the estate-tail, when converted into a base fee, may merge, or the estate-tail may be enlarged into a fee-simple by means of a common recovery; and, as a consequence, the reversion or remainder may be barred, and in effect cease to constitute any part of the ownership.

As to the estate for life, after it shall be merged, the ownership will be governed by the course of descent of the estate in which the merger shall take place. For example, when a man has an estate to him and his heirs for three lives, and that estate is descendible to his heirs *ex parte paternâ*,

and becomes merged in an estate descendible to the heirs *ex parte maternâ*, the maternal heirs will be intitled to the possession, as well during the lives, as after the period originally appointed for the commencement in possession of the reversion or remainder.

So if the estate for lives had been descendible to the heirs *ex parte maternâ*, and that estate had merged in an estate of inheritance, descendible to the heirs *ex parte paternâ*, the maternal heirs would have been excluded even during the lives.

So on the renewal of a lease of an estate for lives, descendible to the heirs *ex parte maternâ*; the estate taken under a new lease would be descendible to the heirs of the lessee in the new lease, on the ground that such lessee is the first purchaser.

But suppose a trustee to have the legal estate, in trust for a person and his heirs, who derives his title by descent *ex parte maternâ*, and the lease to be renewed in the name of the trustee in trust for the same person and his heirs, there are strong grounds for contending that the *new estate* obtained under the tenant right of renewal, would be descendible to the same heirs as were entitled under the original trust. The principle to be extracted from *Fenwick v.*

Mitford, and Earl *Bedford's* case, (*a*) (a principle adopted by courts of law from courts of equity ;) and as to uses enforced on courts of law, by the statute of uses, and the cases which preserve the equity of redemption to the heirs who would have succeeded to the estate if it had not been mortgaged, afford a strong argument that a court of equity would preserve the trust in the line of descent, from the person who was the first purchaser of the original estate in the trust. No decision, however, has been found on this subject.

2dly, As to estates-tail. When the ownership under the estate-tail shall merge in, or as in the case of *Symonds v Cudmore*, shall be united to and blended with the remainder or reversion in fee, the owner of the remainder or reversion in fee, will, for the purposes of descent, be treated as a purchasing ancestor, and consequently the descent will be to the paternal heirs, unless the maternal ancestors were the first purchasers of the ownership, conferred by the remainder or reversion.

But when a person is tenant in tail by purchase, and suffers a common recovery, and thereby enlarges, or converts, his estate-tail into a fee-simple, the estate in

(*a*) 1 Leo. 182. Popham, 3. Moor, 718.

fee, thus acquired, will be descendible to his heirs general, on the ground that he was the first purchaser. On the other hand, if a maternal ancestor had been the first purchaser, the descent would have been in the line of the heirs of that ancestor. The distinctions and the authorities on this point are stated in the 1st Vol. p. 198.

But in those cases in which the ownership under the estate-tail merges in the remainder or reversion in fee, the heirs of the first purchaser of this remainder or reversion will be preferred, or as the case may require, will exclude all other heirs.

As to Extinguishment

It has already been shewn, that on the union of the trust with the legal estate, and the consequent extinguishment of the equitable estate in the legal ownership, the descent will be governed by the legal ownership, as in the instance of *Goodright* on the demise of (*a*) *Alston v. Wells and others.*

So that on the union of the equitable interest with the legal estate, the equitable interest will be extinguished, and the title

(*a*) Dougl. 772. 3 Ves. J. 339.

to the legal estate will govern the title to the equitable ownership.

So on the extinguishment of a *rent*, &c. the *heirs* to the estate in the rent while it was subsisting, will be excluded from all benefit. Also on the purchase by the *lord of manor* of a tenement parcel of the manor, the heirs to the estate in the manor will be intitled in exclusion of the paternal heirs, when the manor is held under a maternal descent. But when the *tenant of a manor*, purchases the services or seignory of his particular tenement, then the services will be extinguished in the land, and the heir to the estate in the land, if held by descent, will be preferred to the heirs of the purchaser of the services; but as to *copyhold* lands held by maternal descent, and enfranchised to the owner of the copyhold tenement, the descent will, it is apprehended, be governed by the purchase of the freehold tenure, and not by the purchase of the copyhold tenure. And yet in *Rich v. Barker*, (a) it is supposed that the enfranchisement only alters the manner of the tenure: and an observation has already been made, in reference to this point.

Also, though the freehold *tenure* should be purchased in the name of a *trustee*, so that

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(a) Hardr. 131.

an union and consequent extinguishment, under the rules of common law, would be avoided, yet the estate in the copyhold tenure will, in equity, be attendant on the estate in the freehold tenure; and the heir under the copyhold tenure will be a trustee for the heir or devisee under the freehold tenure; and customary rights of common, &c. shall cease,(a) and after enfranchisement the customary right of succession, (b) in favor of heirs in gavelkind, borough English, &c. &c. will cease, and the common law right take place.(c)

The cases of *Goodright* v. *Serle*, and *Doe* v. *White*, are also to be noticed. These cases establish the proposition that a man may have an estate in fee descendible to his heirs *ex parte paternâ*, subject to be defeated by an executory devise to his heirs *ex parte maternâ*; and these two interests may continue distinct and subsist as alternate interests; and the estate which is subject to the executory devise, if it should become absolute; or if it should be defeated, then the estate arising under the executory devise, would govern the descent.

And it is to be remembered that a de-

(a) 1 Watk. 369.
(b) Dancer v. Evett, Vern. 392.
(c) 1 Watk. 368.

scent from a testator, who creates contingent remainders, will not merge a particular estate given to his heir by the will, though a descent from any other ancestor would merge that estate.

But if there be a devise to an heir for his life, the descent to him will merge his estate for life, if no other person be concerned in interest.(*a*)

It may also be called to mind that a descent to a husband, will not extinguish a term which he has in right of his wife; nor will a descent to a wife extinguish a term in the husband.(*b*)

But a descent will extinguish a term in an heir, as far as such term may merge by the rules of law, and as far as such merger may be without prejudice to the rights of other persons.(*c*)

As to Persons in Ventre sa Mere.

The general rule is that a child in *ventre sa mere* is for all purposes tending to its benefit, and in some instances even leading to its prejudice, (*d*) to be considered as a child actually in existence. (*e*)

(*a*) Godbold v. Freestone, 3 Lev. 406.
(*b*) Platt v. Sleep, Cro. Jas. 275.
(*c*) Vincent Lee's case, 3 Leon. 161.
(*d*) Blackburn v. Stables, 2 Vezey and Beames, 368.
(*e*) 1 Inst. 241. b.

At the common law, singular as it may seem, a child in this condition, (*a*) might have been vouched. In the case of *Reeve v. Long*,(*b*) it was decided by the court of C. B., and affirmed on error by the K. B., that a contingent remainder was destroyed by the death of the father, and consequent determination of his estate, while the child intitled to that remainder, was in the mother's womb.(*c*) But that decision was overruled in the House of Lords, contrary, however, to the opinion of all the judges. And the opinion of the judges gave occasion to the stat. of 10 and 11 W. 3. c. 16. which, after reciting that "it often happens that by "marriage and other settlements, estates "are limited in remainder to the use of the "sons and daughters, the issue of such "marriage, with remainders over, without "limiting an estate to trustees to preserve "the contingent remainders limited to such "sons and daughters, by which means such "sons and daughters, if they happen to be "born after the decease of their father, are "in danger to be defeated of their remainder "by the next in remainder after them, and "left unprovided for by such settlements,

(*a*) Raym. 164.
(*b*) 1 Salk. 227.
(*c*) Ib.

"contrary to the intent of the parties that "made those settlements," has enacted, that "where any estate already is, or shall here- "after by any marriage or other settlement "be limited in remainder to, or to the use "of the first or other son or sons of the "body of any person lawfully begotten, with "any remainder or remainders over to, or "to the use of, any other person or persons; "or in remainder to, or to the use of a "daughter or daughters lawfully begotten, "with any remainder or remainders to any other person or persons; that any son or "sons, or daughter or daughters, of such "person or persons lawfully begotten, or to "be begotten, that shall be born after the "decease of his, her, or their father, shall "and may by virtue of such settlement, "take such estate so limited to the first and "other sons, or to the daughter or daughters, "in the same manner, as if born in the life- "time of his, her, or their father; although "there shall happen no estate to be limited "to trustees after the decease of the father, to preserve the contingent remainder to "such after born son or sons, daughter or "daughters, until he, she or they come *in* "*esse*, or are born to take the same; any "law or usage to the contrary in any wise "notwithstanding."

The decision of the lords, enforced as it is by the enactment of parliament, has esta-

blished the general rule as it has been stated; and the decisions have carried the principle to the extent, that the after-born child shall be intitled to the rents falling due in the interval, between the death of the father and the birth of the child. The rule of the common law, as well as the enactment of the statute, is confined to persons who are to take by purchase. It has not any application as between persons intitled by *descent*; and therefore the rents which become due while a child is in *ventre sa mere*, and who when born would become heir, will belong to the heir for the time being, and not by relation, to the nearer heir when born: for there may be a long interval between the death of an ancestor, and the birth of a person who eventually may be heir: thus, a person may die leaving a sister his heir, and at a great distance of time, the father may have a son; and that son may become heir in exclusion of the sister.

The practical conclusions to be drawn, are,

1st, That a title depending on the destruction of contingent remainders, cannot be deemed good, as against a child in *ventre sa mere*, because such child when born will be considered as *in esse*, so as to prevent the destruction of the contingent remainders; consequently such title cannot be considered as safe, during the interval, while it shall

be left in doubt whether there is a child in *ventre sa mere*, or whether such child will or will not be born. Consequently there may be a suspension in the right of carrying the estate to market during the period of uncertainty.

2dly, A title cannot be safely accepted from a person who is the heir *pro tempore*, while there is a possibility that a nearer heir or even a co-heir may be born. And it is material that the title of such nearer heir, cannot be barred by nonclaim on a fine, or by the statute of limitations, prior to the period of its birth; for the statute will not begin to run against such nearer heir, until such heir shall be in existence. It is said, that such nearer heir may to the fine of the immediate heir, plead *partes finis nihil*.(a) Had not the point been so decided, a traverse admitting the seisin and avoiding it, would have appeared to be the more consistent proceeding.

It is also to be remembered that an estate once vesting by purchase, in a person answering the description of heir, would not by the common law, be divested by the birth of a nearer heir, unless, indeed, the law in this respectis altered by the statute; and

(a) Hob. 333

it does not seem to be altered, except as to children being in *ventre sa mere.*(a)

But under the learning of uses and of executory devises, a gift to a *class* of persons may give a title, first to one person, and afterwards open and admit of a participation by others. But at the common law, and under the learning of remainders, a gift to a class of persons will not admit to a participation, any who are born after the determination of the particular estate, though such after born persons might take under a gift operating by executory devise, or springing or shifting use.(b)

By this distinction, different parts of the certificate in *Mogg v. Mogg*, are reconciled; the same words of description having under different circumstances, conferred a title on a different number of the grandchildren of the testator.

25thly, Of Persons who have collateral Interests or derivative Estates.

It is a principle of law that, *quod meum est sine facto, sive defectu meo, amitti vel in alienum transferri, non potest.* A conse-

(a) Watkins on Descents, 136, 138, 140.
(b) Mogg v. Mogg, in Chancery, 1815, 1816.

quence of this principle, is, that, notwithstanding the merger or surrender of any estate belonging to a *particular* tenant, the charges created by that tenant, will continue; and so will leases and other estates derived or carved out of the estate so merged; and the rents and conditions annexed to the reversion, as the estate which becomes merged, will cease to exist. Hence the decision in *Webb v. Russel,* and the case already cited from *Moor.* The character of tenant and reversioner does on the merger of this reversion, cease between the particular tenant and his lessee; nor as to rents, services, reservations, &c. is the character communicated to the person in whose estate the merger takes place. But the policy of the law establishes a relation between the owner of a derivative estate, and the person, who, after the merger, has the next estate in reversion or remainder. Therefore after the merger, the under-lessee may *surrender,*(a) to the person who has the next estate; or the lessee may be punished *for waste,* at the suit of the owner of that remainder or reversion. And although prior to the merger of the estate of the lessor, there could not, on account of the *mesne* interest, have been any merger of the derivative estate, in the estate in which the

(a) Shep. Touch. Chap. Surrender.

merger of this reversion has taken place, yet, after the merger of this reversion, the derivative estate may on its union with the next estate in remainder or reversion become merged in that remainder or reversion. The authorities applicable to this point are *Archer's* case, (a) *Bredon's* case, *Treport's* case, *Webb v. Russell*, and many other cases already cited.

26*thly*, *Of Persons who have equitable Estates.*

Merger is not favored in *equity*, except to promote the *intention*. The language of the books is even that *mergers are odious in equity*, and never allowed unless for special reasons;(b) and therefore though there may, as to equitable estates, be an union in equity, as well as at law, yet equity would not permit an acceleration of charges, incumbrances, &c. as a consequence of the union, against the justice of the case, or contrary to the intention. But even in equity, if a man grant a lease of the possession, while he has merely a reversion or remainder expectant on a prior estate; yet on his purchase of the particular estate, equity proceeding upon those rules which govern that

(a) 1 Rep. 67.
(b) Phillips v. Phillips, 1 P. W. 41.

court in enforcing specific performance of contracts, would decree a lease to operate on the ownership thus acquired, subsequent to the lease; so as to charge the possession with the lease. But if a *tenant in tail* of an equitable estate, with the remainder or reversion in fee by descent, should levy a fine with proclamations, instead of suffering a common recovery, it is probable, and indeed almost certain, that the incumbrances affecting the reversion, by reason of the debts of an ancestor, would not be accelerated in equity, as they would be at law, by this union of the ownership of the equitable estate-tail, with the equitable remainder or reversion in fee. No authority for this precise point has been found; but the case of *Phillips v. Phillips*, affords a principle sufficiently relevant to shew the rule of the court. *In that case*(a) an existing estate *pur autre vie*, was limited to one for the life of another, and was not allowed to merge in an estate which the party had to her and the *heirs of her body*: but on her death without heirs of her body, her executors and administrators became intitled as occupants, in exclusion of the heir claiming by resulting trust, and the remainder-man or reversioner; and on the declared ground that merger is odious in equity.

(a) Phillips v. Phillips, 1 P. Wms. 35.

As to money land. The union of the title to the money in the person who is owner of it, whether it be real or personal property, will extinguish the demand. The fund must be taken as it is found.(a)

27thly, Of Persons who are Creditors.

In the last division notice was taken of a point applicable to creditors in reference to equitable estates; but the cases more relevant to the present division are those which arise on the transactions of executors or administrators, who are as such liable to the debts of the persons whom they represent, and whose estates become merged in estates belonging to the executors or administrators in their own right. Executors or administrators may alien the assets of the testator or intestate discharged from the claims of the creditors. The creditors have no specific lien on the property, and therefore cannot follow it at law, except by execution against the goods and chattels of the deceased, while they remain his goods and chattels unadministered. The rule is the same in equity as at law, with the exception of those cases in which there is a fraud by pledging

(a) Pulteny v. Darlington, 1 Bro. Ch. Cas. *223. 2 Ves. Jun. 175.

the goods of the deceased for the debt of the executor or administrator, and thus diverting the goods of the testator from the purposes to which they ought in justice to be appropriated.

After the merger of a term belonging to an executor or administrator in that character, in the reversion or remainder which the executor or administrator, or the husband of an executrix or adminstratrix has, in his own right, the term, *it should seem*, no longer remains the assets against which an execution can be sued as part of the goods of the testator or intestate.

The law considers this alienation or extinguishment of a term, as a *devastavit*; making the executor or administrator liable to an action or process on which execution may be sued against his own proper goods and chattels.

So a merger of the term of an executrix or administratrix in the reversion or remainder of her husband, will be a *devastavit* by the husband and wife, during the coverture, and it should seem, by the wife after the death of her husband, or other determination of the coverture. But on general principles, and even on decisions, the husband could not be liable for the *devastavit* at any time after the death of his wife, or other determination of the coverture, except when there is judgment for the *devastavit*

against him and his wife during the coverture.(*a*)

The authorities which occur in the books are to this effect.

A man had a lease for years as executor, and afterwards purchased the land in fee; the lease is extinct, but yet the lease shall be, against the executor, as assets. (*b*)

A man has a term as executor, and purchases the freehold; the lease is not extinct as far as it is assets; but it seems that it shall be extinct as to the executor, the purchaser to have this as a term.(*c*)

It seems, if a man has a lease for years as executor, and afterwards he purchases the reversion, the lease is not extinct, and especially so far as it is to be assets in his hands, against the executor; and if it should be extinct it seems to be a *devastavit ad ultimum* [read *ad valentiam*.](*d*)

Two had a lease for years as executors to I. S. and they purchased the reversion in fee, the lease is extinct; but they shall be charged for this as assets; but where they have this as executors, and there is a mesne lease in reversion for years, and they purchase the reversion of the land in fee, the

(*a*) Manson v. Bourn, Cro. Car. 518.
(*b*) Broke, Extinguishment, 54.
(*c*) Broke, Executors, 174.
(*d*) Broke, Exting. 57.

first lease remains by reason of the mesne remainder, [read estate.](a)

To these may be added the case already cited that, if feme executrix has a term, and she take baron, and the baron purchase the reversion, the term is extinct as to the feme, if she survive, but in respect of all strangers, she shall account for the term as assets in her hands. (b)

That the term is assets is an opinion to be adopted with caution; and to be understood with some qualification. In consequence of annihilating the term by his own act, the value of the term is assets in the hands of the husband or executor, &c.; making the husband in his life-time, and his wife after his decease, liable to that extent, as for value received; or for a *devastavit*. But at law, the term does not, it is apprehended, continue *specifically* liable to the demands of the creditors, merely as creditors. This is assumed to be the result of the cases. In some of them, it will be observed, it is said the lease is not extinct, especially as to be assets in his hands, as executor; and if it should be extinct it should be assets *ad ultimum* (meaning *ad valentiam*;) in others that it shall be extinct

(a) Broke, Lease, 63.

(b) Moor, 54. pl. 157. Parch. 5 Eliz. Anon. Vin. Abr. Extinguishment.

as to the executor of the purchaser, to have it as a term; and in others that it shall be assets though it be extinct. From these expressions it is evident that a doubt has been entertained on the point. That doubt seems to be resolved into the conclusion that the term will be completely annihilated at law, as against the executor and all other persons; and that the value of that term will be assets in the hands of the executor.

Thus in *Charlton and others v. Low and others*,(a) a case in which the father had a term, and contracted to purchase the inheritance, and died, having made his son executor, who assigned the term to attend the inheritance, and afterwards took a conveyance of the inheritance, Lord Chancellor *Talbot*, said, "It is observable that the "testator *Henry Low*, the father, had in effect purchased the inheritance, and the "son obtained a conveyance of the inheri-"tance in conformity only to the father's "intentions. The term, by this assign-"ment made of it by *Samuel* the son, is "become not assets at law, for which reason "the legatee cannot pursue it specifically, "but must have her satisfaction, as for a "devastavit, out of the executor's assets;

(a) 3 P. Wms. 328.

" for, as this case stands, the legal interest of
" the term being in trust for the mortgagor,
" at the time when the mortgage of the in-
" heritance was made, it was so far a fraud
" on the mortgagee, as it was concealed from
" him ; and the trustees of this term of one
" thousand years, which was assigned to
" attend this inheritance, became trustees
" for the mortgagee of the inheritance.
" Nay a term assigned in trust to attend
" the inheritance, will, in equity, follow all
" the estates created thereout, and all the
" incumbrances subsisting upon such inhe-
" ritance; and is so connected with it,
" that equity will not suffer it to be sever-
" ed to the detriment of a *bona fide* pur-
" chaser, who shall have the benefit of all
" interests which the mortgagor had at the
" time the mortgage was made, unless
" against an intermediate purchaser with-
" out notice.

" Therefore the judgment creditor of the
" mortgagor must be first satisfied accord-
" ing to the priority of liens affecting the
" real estate; in the next place the mort-
" gagee. And as the estate is to be sold for
" the satisfaction of creditors, though the
" sister who is administratrix of her brother
" *Samuel*, claims a debt but by simple con-
" tract, on account of the devastavit ; yet
" having a right, as administratrix, to re-
" tain against all creditors in equal degree,

"she shall consequently retain her debt "prior to all the simple contract creditors "of her brother."

Though such are the rules of courts of law, it is at least probable that a court of equity would not suffer creditors to be defrauded by the merger of the term; but would follow the inheritance while it remained with the executor, &c. or with the wife, or with the husband; so as to give to the creditors out of the inheritance, a compensation to the value of the term as assets belonging to them in equity, though withdrawn from them by the rules of law. This, if it be the rule of the court, is one of the many exceptions to the general rule, *æquitas sequitur legem*. But the case of *Charlton v. Low* seems to negative the equity, while other cases, which prove that a court of equity will revive an estate which has been merged, to the prejudice of a *cestui qui trust*, favor the equity.

28thly, Of Persons who have legal and equitable Interests united.

The exception to merger arising from the circumstances that the same person takes in different rights, must be also attended by the circumstance that both these rights are recognized by law, and considered to

be distinct; and not merely by the circumstance that one of the rights is legal, the other equitable.(*a*) And in many instances in which a legal estate held in trust has been merged, the court has ordered a conveyance to be made to create a like interest.(*b*) Also to change priorities, as between mortgagees there must be a legal estate.(*c*)

And as a legal estate cannot merge in an equitable one, it frequently deserves consideration, in the application of merger, to consider whether the term be not legal, and the inheritance equitable, or *e converso*.

But there will not be any relief in equity when the *intail* of a copyhold, is destroyed by the descent of the freehold tenure; for there is a legal ownership of each estate; and the extinguishment is in consequence of ownership, and by the ordinary application of the rules of law.(*d*)

It has already been shewn that an equitable fee may be extinguished in the legal fee, and that the purchase of the legal fee will govern the order of succession.

In general too, all equitable interests will be absorbed in, and extinguished by the legal interest, as far as they are united,

(*a*) Lane, 111. Str. 240. 689.
(*b*) 3 Ch. C. 52. Supra.
(*c*) Str. 689. Willoughby v. Willoughby, 2 Term Rep.
(*d*) 2 Vern. 91. 2 Ves. J. 524.

since the legal estate will govern the title, as far as the same person has the legal estate, and the benefit of that estate, as the equitable owner.(a)

But the legal estate will not extinguish more of the equitable interest, than is corresponding to, and co-extensive with the legal estate.

Also it is said, where a charge upon land comes to the same person,(b) that is intitled to the land, if he has not the same interest in both, there shall be no extinguishment upon this account.(c)

This observation affords a distinction between legal and equitable estates, on the one hand, and freehold and copyhold interests, on the other hand; because the fee of a copyhold may be extinguished in a particular estate of the freehold tenure. So if a person has *a charge* on the inheritance, and purchases an estate, being a portion of that inheritance, the charge will not be extinguished or suspended, except so far as it affects the ownership which the party acquires in such portion of the inheritance.

The general rule also is, that if a per-

(a) Wade v. Paget, 1 Bro. C. C. 363.

(b) Clerk v. Rutland, Lane, 111. Chester v. Willes, Ambl. 246.

(c) Price v. Seys, Barn. Ch. Cas. 120.

son has *a portion* charged on the inheritance, and then acquires the inheritance in fee by purchase, the charge cannot be enforced by the personal representatives to the prejudice of the heirs or real representatives, unless there be evidence of the intention of the owner of the fee, that the charge should not merge.(*a*)

It is otherwise when the inheritance descends on an *infant* intitled to a portion, or when an estate-tail only(*b*) is acquired, or creditors would be prejudiced.(*c*)

The first of these exceptions to the general rule is from principles peculiar to courts of equity, in favor of infants, that a portion belonging to an infant shall not,(*d*) during her infancy, be extinguished to the prejudice of the executors or administrators, for the benefit of the heir. This point opens to the extensive learning of merger of portions, and it would be tedious in this place to trace all the distinctions. There are also some other exceptions to the general rule that the succession shall be governed by the legal and not by the equitable estate, for if a person has a term of years at law,

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(*a*) Chester v. Willes, Ambl. 246.

(*b*) Chandos v. Talbot, P. W. Ambl. 246.

(*c*) Ambl. 600.

(*d*) Powell v. Morgan, 2 Vern. 91. Thomas v. Keymish, 2 Vern. 348.

and purchases the equitable inheritance, the term will become attendant on the inheritance, for the benefit of the heirs, in exclusion of the executors, or more correctly speaking, the executors as to the legal estate, will become trustees for the heirs.(*a*) Also when a copyholder of the legal estate purchases the equitable fee of the freehold tenure, the heirs of the freehold tenure, though merely equitable, will be intitled to the benefit of the legal estate of the copyhold tenure. These general observations will be sufficient to induce an investigation of the many and nice distinctions which will be found on an examination of the rules of courts of equity, as applied between persons having conflicting rights, arising under like circumstances. The general rule,(*b*) however, is, "if a man has the "same interest, and absolute dominion and "property in the whole inheritance, as he "has in the term or power for raising mo-"ney out of the inheritance, there it must "merge, for a man cannot have a power "to raise money merely for my benefit out "of that which is mine. But if there be "any difference in the two interests, or any other person intermediate, then there can be no merger; for if there be any merger

(*a*) Charlton v. Low, 3 P. Wms. 328.
(*b*) 2 Fonbl. 167.

"in the first case, it will change the intent
"of the conveyance; and in the other case,
"there being an intermediate estate, there
"is no merger at law, no more is there in
"a court of equity in the case of a
"trust."

And it was held by Lord Chancellor *Hardwicke*, in the case of *Willoughby v. Willoughby*,(*a*) that though the law says, that the term and the fee being in different persons, they are separate distinct estates, and the one not merged in the other, yet the beneficial and profitable interest of both being in the same person, equity will unite them for the sake of keeping the property entire.

But though a term will not become attendant on the inheritance, by the construction of a court of equity, except under the circumstances stated in the general rule, yet it may under other circumstances become attendant, by the express declaration of the owner of the term, and of the inheritance.(*b*)

In this place it will be relevant to notice the consequence of the payment of a *charge* by a person who has a particular estate for life or in tail.

Either of these persons on paying the

(*a*) 1 Term Rep. 763.
(*b*) Scott v. Fenhoulet, 1 Bro. Ch. Cas.

charge may by express declaration, by actual assignment, or by any other act which is equivalent to a declaration or an assignment, keep the charge on foot for the benefit of his personal representatives. But it was necessary that a rule should be framed for regulating the rights of representatives when no declaration or assignment existed; and the courts of equity have, by their decisions established these distinctions—First, when a tenant in tail(*a*) having as such power of alienation, pays off a charge on the estate, he is considered to have intended to exonerate the estate.

In order therefore to preserve the charge for the benefit of his personal representatives against the issue in tail, or against the persons in reversion or remainder, there must be a declaration or an assignment, demonstrating an intention to preserve the charge; and here note the difference between the payment of a charge, which is a voluntary act, and the devolution of the estate to him when he already has the charge.(*b*)

But when a tenant for life, or even a tenant in tail, who is excluded from the power of alienation, pays off a charge; then *prima facie*, and in the absence of evidence, the charge will continue for the benefit of

(*a*) 1 Bro. C. C.

(*b*) Chandos v. Talbot, 2 P. W.

his representatives: and in order to extinguish the charge for the benefit of the owners of the estate,(*a*) viz. the persons in remainder or reversion, there must be evidence of an intention to exonerate.

And a person who has a limited interest, consisting of an estate for life, and of a remainder or reversion in fee, subject to interposed estates in other persons,(*b*) will be considered only as a tenant for life with reference to the charge.

And in all cases involving these or similar questions, the prudent course is by an express declaration or an assignment, to adjust the rights as between those who are to succeed to the property after the death of the tenant for life, or the tenant in tail, by an instrument which shall fully and clearly express the intention.

As connected with the subject it may also be observed; that when an estate is incumbered by an ancestor, or former owner, and some of these incumbrances are discharged by the succeeding owner, then as between the other incumbrances, and the owner, the owner will be intitled to stand in the place of those persons, whose incumbrances he has discharged, and to obtain the like

(*a*) Shrewsbury v. Shrewsbury, 1 Ves. J. 227.

(*b*) Wyndham v. Earl of Egremont, Ambl. 753. Jones v. Morgan, 1 Bro. C. C. 206.

priority, &c. But when a man has created various incumbrances, and discharges some of them, such exoneration will be for the benefit of the other incumbrancers, so as to accelerate their charges, and give to them the benefit of the exoneration.

29thly, As to Persons who have a prior Title, and who are interested in, or may be affected by, the Consequences of a Merger.

Lastly, Of Persons who have collateral Claims upon, or Interests derived out of both or either of the Estates, which are united; and under this Head of the Acceleration of the Estate in Reversion or Remainder, as a Consequence of the Merger.

The material points properly belonging to these several heads have in effect been already examined. To give a summary view of their application is all that remains to be performed.

The general rule is, that a *stranger or third person*, shall not be prejudiced by merger; and hence the case in Co. Litt.(a) already cited, "that if tenant for life surrender to him in reversion, being *within* "*age*, he shall not have his age, for that

(a) 1 Inst. 338. b.

"should be a prejudice to a stranger who "is become a *demandant* in a real action."

But strangers may be benefited by or in consequence of a merger. Thus a title by *dower* or *curtesy* may arise; an *interesse termini* may commence in estate; the protection from an action of waste, by reason of a mesne interposed estate of freehold, may cease in consequence of the merger; and a person who has a right of action, may be obliged to sue one person instead of suing another, though an *infant*, because the freehold which was in one person has, by the merger, been changed to another person.

In regard to *benefit*, it has been shewn that *creditors* who have claims on a reversion or remainder, may prosecute those claims against the possessor, by reason that the reversion or remainder has, by merger, become an estate in possession. So a *rent-charge*, granted by a person who has a reversion or remainder, may become a charge on the possession, because the particular estate is determined by merger, and the reversion or remainder accelerated.

Also *a charge* on the particular estate may, notwithstanding this merger, continue, on the ground that the person intitled to this rent, cannot be prejudiced by the merger. The general effect of merger, as it has already been shewn, is, as between the particular tenant, whose estate is merged,

and the reversioner or remainder-man, to bring the reversion or remainder into the same place and like condition, as if the particular estate had never existed, or had determined by completing the period of its continuance: at the same time, the particular estate is, for all the purposes of title, to be contemplated by the lawyer, as having existed and as continuing in point of title, though determined as an estate; and the charges, by way of *rent*, *judgment*, *annuity*, and *under-leases*, to have continuance in like manner and for the same time, as if the particular estate were actually continuing.

A few particular cases may be noticed.

1st, A charge on a *lunatic's* estate, falling in to him as representative to his sister, shall sink for his heir at law.(*a*) This point is referred to the ground that there is no equity between the heir at law of a lunatic, and his personal representatives.

2dly, By the surrender and consequently by the merger of a mesne estate of freehold, a reversioner or remainder-man may complete his right to maintain an action for *waste*.(*b*)

(*a*) 4 Bro. Ch. Cas. 397. Compton v. Oxenden.

(*b*) Paget's case, 5 Rep. 76. b. Gwill. Bacon Waste, I. 1 Inst. 338. b.

The case in *Perk.* s. 623, proves that a title to *dower* may arise, in consequence of merger.

So a privilege, as *exemption from punishment for waste,* which was annexed to an estate, may be lost by the merger of the estate, to which that privilege was annexed.(*a*)

So by the *enlargement of* an estate the privileges annexed to the estate which is enlarged, will cease.(*b*)

Thus, if lessee for years or for another's life, be without impeachment of waste, and the lessor confirm to him for his own life, and omit that clause, his privilege is gone, and the estate is become punishable for the waste.

This is an example of a new estate introduced by the confirmation, &c. which has caused the merger of the particular estate, and as a consequence the extinguishment of the privilege annexed to that estate.

If the lessor confirm the estate of his lessee for life, with this clause, to hold without impeachment of waste, this is a good confirmation to change the quality of estate, so far as to make it dispunishable for waste;

(*a*) Bowles's case, 11 Rep.

(*b*) Shep. Touch. Chap. Confirmation.

or, more correctly, it is the annexation of a *new* privilege to an *old estate*.

It remains to notice the effect of merger on the statute of *limitations* and of *nonclaim on fines*. These statutes never operate, except against rights and titles of entry, and of action. An estate *while it remains an estate*, cannot be barred by either of these statutes. Therefore persons having rights or titles in respect of successive estates, cannot, it is apprehended, cause the effect of surrender or merger of the right or title to a particular estate, so as to accelerate the right of the person who is intitled under the reversion or remainder, to pursue his remedy and prosecute his right. Such merger, surrender, or extinguishment would prejudice the person who, under the statute of limitations, or under the non-claim on a fine, had acquired a title, as against the rightful owner of the particular estate. But if *lessee for years* be ousted, and he in the reversion disseised him, and the lessee release to the disseisor, the disseisee may enter,(*a*) for the term for years is extinct. But otherwise it is in the case of a *lessee for life*; for the disseisor hath a freehold, whereupon the release of a tenant for life may

(*a*) 1 Inst. 275. b. 276. a.

enure: but the disseisor hath no term of years, whereupon the release of the lessee for years may enure.

On these distinctions it is observable that the release is to the disseisor and not to the disseisee. After, as well as before, the release, the person intitled to the reversion may maintain his real action, and recover the seisin; and the disseisor cannot insist on the term as a protection, since he himself has, by *his own act, caused the extinguishment* of the term; and therefore after recovery in a real action the disseisor may maintain ejectment; and it is material to this case, and to many others of a similar nature, that a man can never have a term for years, unless there be a reversion or remainder in some other person; and the disseisor can never, after such release, alledge that he is the owner of the term, so as to be tenant to the person who had the reversion or remainder. But when there is a disseisin of tenant for life, and, as a consequence, of a person who has the remainder or reversion, then the release by the tenant for life, operates by way of confirmation of title, by adding the right to the seisin; and no real action can be maintained by the person who has the reversion or remainder until the determination of the

time of *enjoyment* conferred by the estate for life.

And when the termor for years is barred, and no release taken, then it should seem that the disseisor may protect himself in the possession during the term.

Thus, after the labor of twenty-five years, and an attempt to collect all the material authorities which, during that period, have occurred to the notice of the writer of these observations, this volume will be closed. Every day's experience has more fully satisfied him of the importance of this subject ; a subject which has hitherto escaped general attention, and been neglected for want of some work bringing the authorities into one view, and shewing their practical application : and should the reader derive as much useful knowledge from the perusal, as the author has done in the collection of the materials, his end will be fully attained.

It was intended to have introduced the learning of *surrenders* into this volume ; but the subject of merger has been enlarged to three times the extent of the plan, as designed when the first part of the work was sent to the press.

The subject of surrenders will therefore be reserved for the first chapter of the fourth volume. At the end of that volume a digested index of the subjects in this volume, as well as of the subjects to be introduced in the fourth volume, will probably be added. To have added such index at present would have increased this volume to an inconvenient size.

END OF VOL. III

W. Flint, St. Sepulchre's, London

AN

INDEX

TO SOME OF THE PRINCIPAL POINTS

NOTICED IN THIS VOLUME.

There are likely to be errors in many of the figures. The error may be rendered of little importance by taking the Table of Contents as an assistant for any research for a particular point.

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